Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ANTONIO RODRIGUEZ-ZAPATA,

Petitioner,

v.

ALBERTO R. GONZALES,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under former 8 U.S.C. § 1182(c), certain lawful permanent residents ("LPRs") were eligible to seek discretionary relief from removal from the United States ("§ 212(c) relief"). When Antonio Rodriguez-Zapata was convicted of an aggravated felony by a jury in 1995, he would have been eligible to apply for § 212(c) relief. In 1996, however, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which repealed § 212(c) and replaced it with a procedure called cancellation of removal. Cancellation of removal is not available to any LPR convicted of an aggravated felony. Removal proceedings were initiated against Rodriguez-Zapata in 2001. Both the Immigration Judge and the Board of Immigration Appeals denied his request to apply for § 212(c) relief despite strong equities in his favor. The Fifth Circuit affirmed, holding that the repeal of § 212(c) did not have an impermissible retroactive effect on LPRs convicted of an aggravated felony by a jury prior to IIRIRA. The Fifth Circuit also held that the right to seek § 212(c) relief is not protected by due process.

This case presents the following important question:

Whether an LPR convicted of an aggravated felony by a jury prior to IIRIRA remains eligible to seek § 212(c) relief, including two questions on which the courts of appeals are divided:

(1) Is a showing of reliance on prior law required to establish that a statute creates an impermissible retroactive effect and, if so, what type of reliance is required?

(2) Is the right to seek discretionary relief from removal under § 212(c) protected by the Due Process Clause of the Fifth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

Antonio Rodriguez-Zapata respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported (Case No. 05-60778). The order of the Fifth Circuit denying Rodriguez-Zapata's petition for rehearing *en banc* is unreported. (App., *infra*, 8a-9a). The opinions of the Board of Immigration Appeals ("BIA") and the Immigration Judge ("IJ") are also unreported. (App., *infra*, 3a-7a).

JURISDICTION

The court of appeals' judgment was entered on August 3, 2006. The court of appeals denied a timely petition for rehearing *en banc* on October 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are reprinted, in pertinent part, on page 10a of the Appendix: 8 U.S.C. § 1182(c) (1994 ed.); 8 U.S.C. § 1229b(a); IIRIRA § 304(b), 110 Stat. 3009; U.S. CONST. amend. V, § 4.

STATEMENT

The fundamental issue in this case is whether LPRs convicted of an aggravated felony by a jury prior to IIRIRA are entitled to seek § 212(c) relief in removal proceedings begun after IIRIRA repealed such relief. In *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 326 (2001), this Court held that applying IIRIRA's repealing provision—§ 304(b)—to aliens who *pled guilty* to an aggravated felony prior to IIRIRA would create an impermissible retroactive effect. Since *St. Cyr*, the lower courts have struggled with the application of IIRIRA § 304(b) to aliens previously convicted of an aggravated felony *by a jury*. In this case, the Fifth Circuit concluded that such aliens are

not eligible to seek § 212(c) relief. In reaching that decision, the Fifth Circuit took a position on two important questions that have divided the courts of appeals.

First, the courts of appeals are deeply split over whether proof of "reliance" on prior law is required to establish that applying a new statute retroactively would be impermissible. In this case, the Fifth Circuit held that IIRIRA § 304(b) did not have an impermissible retroactive effect as applied to aliens who went to trial and were convicted of an aggravated felony before § 212(c) was repealed. The court relied exclusively on its prior decision in *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 40 (2006). *Hernandez-Castillo* held that IIRIRA § 304(b) was not impermissibly retroactive as to such aliens because they had not "detrimentally changed [their] position in reliance on continued eligibility for § 212(c) relief." 436 F.3d at 520 (quoting *Rankine* v. *Reno*, 319 F.3d 93, 99-100 (2d Cir. 2003)). This holding requires a showing of "actual reliance" on prior law to prove that a statute creates an impermissible retroactive effect—a position that conflicts directly with decisions of the Third, Fourth, and Tenth Circuits.

Five other circuits—the First, Second, Seventh, Ninth, and Eleventh—have likewise required a showing of actual reliance. By contrast, two circuits—the Third and Tenth—have concluded that, at most, this Court's retroactivity precedent requires a showing of reasonable reliance on prior law. The Fourth Circuit has gone even further, holding that no showing of reliance on prior law is required to establish an impermissible retroactive effect.

Under the reliance standards established by the Third, Fourth, or Tenth Circuits, this case would have been analyzed differently and likely would have resulted in a different outcome. Indeed, both the Third and Tenth Circuits have held that IIRIRA § 304(b) has an impermissible retroactive effect on aliens convicted by a jury in certain circumstances. See *Hem* v. *Maurer*, 458 F.3d 1185, 1191 (10th Cir. 2006); *Pon-*

napula v. *Ashcroft*, 373 F.3d 480, 493 (3d Cir. 2004). This conflict is especially troubling given the significant constitutional interest in uniform application of the immigration laws. See *Ferreira* v. *Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) ("In the immigration context * * * the need for national uniformity is paramount * * *."); *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 399 (5th Cir. 2006) (noting "the overarching constitutional interest in uniformity of federal immigration and naturalization laws").

The Fifth Circuit's decision also contravenes this Court's well-established retroactivity precedent. The Court has blocked retroactive application of new laws without requiring any reliance—let alone actual reliance—on prior law. *E.g.*, *Hughes Aircraft* v. *United States*, 520 U.S. 939, 946-51 (1997) (holding statute was impermissibly retroactive without mentioning reliance). Rather, it consistently has held that a statute has an impermissible retroactive effect if it "attaches new legal consequences to events completed before its enactment." See *St. Cyr*, 533 U.S. at 321; *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269-70 (1994).[1] As explained on pages 25-27 below, IIRIRA's repeal of § 212(c) meets that test.

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[1] Unlike other petitions denied by this Court, this petition squarely presents the reliance issue and is not hindered by factual or procedural complications. See, *e.g.*, Petition for Writ of Certiorari, *Appel* v. *Gonzales*, 127 S. Ct. 659 (2006) (No. 06-72), 2006 WL 1994676 (involving retroactive application of IIRIRA § 304(b) to aliens convicted in jury trial but not presenting question on role of reliance); Brief For Respondent in Opposition at 5-6, *Kelava* v. *Gonzales*, 127 S. Ct. 43 (2006) (No. 05-1312), 2006 WL 2365437 (applying IIRIRA § 304(b) to alien deportable for "engaging in" terrorist activity); Brief For Respondent in Opposition at 11-12, *Thom* v. *Gonzales*, 126 S. Ct. 40 (2005) (No. 04-9116) (petitioner would not have been eligible for § 212(c) relief even under pre-IIRIRA law); Brief For Respondent in Opposition at 10-11, *Reyes* v. *McElroy*, 543 U.S. 1057 (2005) (No. 04-5983) (same); Brief For

Second, the Fifth Circuit held that eligibility to seek § 212(c) relief is not subject to due process protections. Five other circuits agree. Yet these decisions fail to recognize the critical distinction between the right to *seek* discretionary relief and the right to *receive* it. Moreover, they are directly contrary to decisions of the Second and Ninth Circuits, which have concluded that the right to seek § 212(c) relief is protected by the Due Process Clause.

As this Court has recognized, the number of aliens whose ability to remain in the United States depends on eligibility for § 212(c) relief is "extremely large" given the broad scope of removable offenses. *St. Cyr*, 533 U.S. at 296. Nine circuits have now addressed the role of reliance in analyzing the retroactive effect of IIRIRA § 304(b) and reached three conflicting results. See *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1275 n.7 (11th Cir. 2002) (noting the "plethora of cases that have inundated [the circuits]" on the retroactivity issue). Confusion over the role of reliance has also emerged outside the immigration context, heightening the need for this Court's review.[2] Furthermore, eight circuits have taken conflicting positions on whether the right to seek § 212(c) relief is protected by due process. The Court should take this opportunity to resolve the disagreements among the lower courts on these important and recurring issues.

A. Rodriguez-Zapata's Background And Conviction

Rodriguez-Zapata was admitted to the United States as an LPR on May 5, 1981, at the age of 19, in Brownsville, Texas. R60.[3] Since his admission as an LPR, he has estab-

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Respondent in Opposition at 10-11, *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005) (No. 04-6980) (same).

[2] See, *e.g.*, *In re Jones*, 226 F.3d 328, 331 (4th Cir. 2000) (noting "varying" approaches to role of reliance in retroactivity analysis of AEDPA habeas provisions).

[3] Unless otherwise noted, all citations to "R__" refer to the record before the Fifth Circuit.

lished deep and extensive family ties in the United States. He has been married to Eva D. Rodriguez, also an LPR, since 1984. R65, 68. The couple has four children, ages 9, 13, 16, and 20. R70-76. The three youngest children were born in the United States, while the oldest is an LPR. *Ibid.* In addition to his immediate family, Rodriguez-Zapata has strong ties to several extended family members in the United States. His father has been a United States citizen since 1979, and four of his siblings are legal residents; all currently live in Texas. R61, 78-86.

In addition to his extensive family ties, Rodriguez-Zapata has established significant employment and community ties. In the 25 years since his admission to the United States, he has maintained steady employment as a bricklayer. R118. The Rodriguez-Zapata family has resided continuously in Brownsville, Texas for many years. R60. In fact, the family's three youngest children were born in Brownsville. R72-76. In 2000, Rodriguez-Zapata and his wife purchased a home there. R193-96.

Despite these strong family and community ties, Rodriguez-Zapata's current removal order stems from a single incident that occurred over a decade ago. On October 18, 1995, Rodriguez-Zapata was convicted of one count of indecency with a child following a jury trial in Brownsville. R138. Although the sentencing range for the offense was two to twenty years imprisonment, given that he was a first offender, the jury recommended ten years probation and a $2,000 fine. R140, 144. He was scheduled to complete his probation on October 18, 2005. R122. At the time of his conviction, no removal proceedings were instituted against Rodriguez-Zapata.[4]

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[4] In 1996, IIRIRA "changed the nomenclature of immigration orders so that orders of deportation and orders of exclusion are both now referred to as 'orders of removal.' " *Cardoso* v. *Reno*, 216 F.3d 512, 515 n.3 (5th Cir. 2000); IIRIRA § 309(d)(2), 110 Stat.

B. Section 212(c) Relief

Prior to 1996, certain LPRs under a final order of removal were eligible to seek discretionary relief from the Attorney General under 8 U.S.C. § 1182(c) based on equitable considerations. This provision, commonly known as "§ 212(c)," read in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)) * * * .

8 U.S.C. § 1182(c) (1994).[5] The statute imposed additional requirements for LPRs who, like Rodriguez-Zapata, had been convicted of an aggravated felony:

> The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Ibid. It is undisputed that under pre-IIRIRA law, Rodriguez-Zapata would have been eligible to seek § 212(c) relief. He (1) was a lawful permanent resident (2) with "unrelinquished domicile of seven consecutive years" who (3) had not served

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3009-627 (1996). The terms "deportation" and "removal" are used interchangeably in this petition.

[5] Although § 212(c) on its face applies only to aliens seeking *admission* to the United States, it has long been interpreted to apply to LPRs seeking to avoid *removal* from the United States as well. See *Francis* v. *I.N.S.*, 532 F.2d 268 (2d Cir. 1976), adopted by BIA in *In re Silva*, 16 I & N Dec. 26, 28-30 (BIA 1976).

five or more years in prison for an aggravated felony.[6] See pp. 4-5, *supra*.

Under § 212(c), the IJ or BIA could grant discretionary relief from removal based on a number of equitable considerations, such as (1) "family ties within the United States," (2) "residence of long duration in this country," (3) "evidence of hardship to the respondent and family if deportation occurs," and (4) "a history of employment." *In re Marin*, 16 I & N Dec. 581, 584 (BIA 1978). Prior to the repeal of § 212(c), over half of the applications for relief were granted. *St. Cyr*, 533 U.S. at 296 n.5; see also *Ponnapula*, 373 F.3d at 486 (noting that relief was "predictably granted" when certain equitable factors were present).

C. Statutory Changes To § 212(c) Relief

In 1996, after Rodriguez-Zapata's conviction, Congress enacted two statutes that substantially changed the immigration laws. First, in April 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). See 110 Stat. 1277. In § 440(d) of AEDPA, Congress amended 8 U.S.C. § 1182(c) to preclude § 212(c) relief for, among other groups, any alien who had been convicted of an "aggravated felony" after admission to the United States. *Ibid.*

In September 1996, Congress passed IIRIRA. See 110 Stat. 3009. IIRIRA § 304(b) repealed § 212(c) completely

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[6] This is a critical factor that makes this petition a good vehicle for decision. In several recent petitions denied by this Court, the petitioners would not have been eligible for § 212(c) relief even under pre-IIRIRA law because they had already served more than five years in prison for an aggravated felony. See Brief For Respondent in Opposition at 11-12, *Thom* v. *Gonzales*, 126 S. Ct. 40 (2005) (No. 04-9116); Brief For Respondent in Opposition at 10-11, *Reyes* v. *McElroy*, 543 U.S. 1057 (2005) (No. 04-5983) (same); Brief For Respondent in Opposition at 10-11, *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005) (No. 04-6980) (same). Thus, any decision on retroactivity would have been advisory.

and replaced it with a new procedure called "cancellation of removal" (codified at 8 U.S.C. § 1229b). See 110 Stat. 3009-594. Like the amended § 212(c) under AEDPA, the new "cancellation of removal" process is not available to aliens who have been convicted of any aggravated felony. See 8 U.S.C. § 1229b(a)(3).

D. Rodriguez-Zapata's Removal Proceedings And Habeas Petition

On June 27, 2001, the Immigration and Naturalization Service ("I.N.S.") issued a Notice to Appear charging that Rodriguez-Zapata was deportable under 8 U.S.C. § 1227(a)(2)(A)(iii) because he had been convicted of an "aggravated felony" after admission to the United States. R224. The Notice to Appear cited his October 1995 conviction. *Ibid.* At his hearing before the IJ, he admitted the factual allegations in the Notice to Appear and conceded removability. R40. He also asserted his eligibility for § 212(c) relief. R40-41.

On September 13, 2002, he appeared before the IJ for a merits hearing during which he again asserted his eligibility for § 212(c) relief. R46. He argued that applying AEDPA and IIRIRA to deprive him of § 212(c) relief was impermissibly retroactive because his conviction had occurred prior to the passage of both laws. R50-52. The IJ concluded, however, that he "ha[d] no option but to find [Rodriguez-Zapata] not eligible for [§ 212(c)] relief" because he had been convicted of an aggravated felony following a jury trial rather than a guilty plea. App., *infra*, 6a. As a result, Rodriguez-Zapata was ordered removed to Mexico. R31.

Rodriguez-Zapata timely filed a notice of appeal with the BIA. R25. He argued again in his brief that, under Supreme Court precedent, the repeal of § 212(c) could not be applied retroactively to his case. R13-21. On December 10, 2003, the BIA summarily affirmed the removal order without opinion. App., *infra*, 3a.

Rodriguez-Zapata then challenged the removal order by filing a petition for a writ of habeas corpus in the U.S. District Court for the Southern District of Texas on January 6, 2004 (No. 1:04-cv-00004). Dkt. 1.[7] While his habeas petition was pending, Congress passed the REAL ID Act. 119 Stat. 231 (2005). Pursuant to § 106(c) of the REAL ID Act, the case was transferred to the Fifth Circuit on motion by the Government and converted into a petition for review. Dkt. 17.

E. Fifth Circuit Decision

In the Fifth Circuit, Rodriguez-Zapata argued that, under a correct reading of this Court's retroactivity precedent, IIRIRA § 304 cannot apply retroactively to his case because it attaches new legal consequences to past events: his underlying criminal conduct as well as his conviction. Pet. Br. 10-29. He noted that this Court's precedent does not require proof of reliance on prior law to show that applying a new statute retroactively is impermissible. *Ibid.* Rodriguez-Zapata also argued that denial of a § 212(c) hearing violated his due process rights. *Id.* at 33-41.

The panel rejected these arguments and denied Rodriguez-Zapata's petition for review. It cited *Hernandez-Castillo*, 436 F.3d at 517, 519-20, in concluding that "application of the Illegal Immigration Reform and Immigra[nt] Responsibility Act's repeal of INA § 212(c) to aliens who, like Rodriguez, went to trial and were convicted of an aggravated felony prior to the repeal of § 212(c), [does] not create an impermissible retroactive effect." App., *infra*, 2a. The panel also rejected Rodriguez-Zapata's argument that eligibility for § 212(c) relief is subject to due process protections, relying on *United States* v. *Lopez-Ortiz*, 313 F.3d 225, 230-31 (5th Cir. 2002). App., *infra*, 2a.

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[7] In this petition, documents filed in the district court are cited by docket number.

REASONS FOR GRANTING THE PETITION

The IJ erred in finding Rodriguez-Zapata ineligible for § 212(c) relief for two independent reasons. Both implicate important and recurring splits of authority among the circuits that should be resolved by this Court.

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH CASES FROM THREE OTHER CIRCUITS AND THIS COURT ON THE ROLE OF RELIANCE IN RETROACTIVITY ANALYSIS.

As discussed below, the Fifth Circuit required proof of "actual reliance" on the availability of § 212(c) relief to establish that retroactive application of IIRIRA § 304(b) would be impermissible. This holding is directly contrary to decisions of the Third, Fourth, and Tenth Circuits. Moreover, the Fifth Circuit's decision contravenes this Court's retroactivity precedent by erroneously imposing an actual reliance requirement.

Several courts have noted the existence of this circuit split and its impact on the application of IIRIRA § 304(b). See *Hem*, 458 F.3d at 1191 (observing that the circuits have split on the "essential" issue of "whether reliance must be established objectively, subjectively, or even at all" in the retroactivity analysis of IIRIRA § 304(b)); *Kelava* v. *Gonzales*, 434 F.3d 1120, 1125, n.7 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 43 (2006); *Olatunji* v. *Ashcroft*, 387 F.3d 383, 390 (4th Cir. 2004) (noting "substantial confusion as to whether a party must prove some form of reliance in order to demonstrate that a statute is impermissibly retroactive"). This case presents an opportunity for the Court to resolve the split of authority on this important and recurring issue while also clarifying its retroactivity precedent.

A. A Three-Way Circuit Split Has Emerged On The Role Of Reliance In Retroactivity Analysis.

1. Six circuits have imposed an "actual reliance" requirement.

In this case and its prior decision in *Hernandez-Castillo*, the Fifth Circuit joined five other circuits in requiring actual reliance on prior law to avoid retroactive application of IIRIRA § 304(b). This holding directly contradicts decisions of the Third, Fourth, and Tenth Circuits, all of which have held that actual reliance is not required to establish impermissible retroactivity.

The Second Circuit's opinion in *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir. 2003), is representative of the decisions that require actual reliance. *Rankine* involved three aliens who, like Rodriguez-Zapata, were convicted of an aggravated felony by a jury prior to IIRIRA. *Id.* at 96-97. Applying this Court's touchstone statutory retroactivity case, *Landgraf*, the Second Circuit held that the aliens were not entitled to § 212(c) relief because they had not "detrimentally changed [their] position *in reliance* on continued eligibility for § 212(c) relief." *Id.* at 99 (emphasis added).

The *Rankine* court interpreted *St. Cyr* as holding that it was "*reliance*, and the consequent change of immigration status, that produced the impermissible retroactive effect of IIRIRA" on aliens who had pled guilty to aggravated felonies prior to passage of IIRIRA. *Id.* at 100 (emphasis added). Accordingly, the court concluded that "[b]ecause those aliens who went to trial prior to the elimination of § 212(c) relief cannot show that they altered their conduct *in reliance* on the availability of such relief, we hold that IIRIRA's repeal of § 212(c) is not impermissibly retroactive as applied to them." *Ibid.* (emphasis added).

The Fifth Circuit expressly adopted the reasoning of *Rankine* in *Hernandez-Castillo*, 436 F.3d at 520, quoting much of the above language. Four other circuits have like-

wise required a showing of actual reliance to avoid retroactive application of IIRIRA § 304(b). For instance, the First Circuit denied § 212(c) relief to an alien convicted by a jury because "there was not, and could not have been, reliance * * * on the availability of discretionary relief." *Dias* v. *I.N.S.*, 311 F.3d 456, 458 (1st Cir. 2002) (per curiam) (citing *Mattis* v. *Reno*, 212 F.3d 31, 38 (1st Cir. 2000), which held that alien must show that he "actually and reasonably relied on the availability of § 212(c) relief").

Likewise, in *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), the Ninth Circuit denied § 212(c) relief to an alien convicted after trial because "[u]nlike aliens who pleaded guilty, aliens who elected a jury trial cannot plausibly claim they would have acted any differently if they had known about [elimination of § 212(c) relief]." The Ninth Circuit recently reaffirmed this position in *Kelava*, 434 F.3d at 1125 (9th Cir. 2006). See also *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (per curiam) (holding that alien convicted after jury trial was not eligible for § 212(c) relief because "such aliens did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief"); *Brooks*, 283 F.3d at 1274 (11th Cir.) (denying § 212(c) relief because "[t]here are not the same concerns of *quid pro quo*, benefit for an exchange" when alien chooses trial rather than guilty plea).

2. The Third, Fourth, and Tenth Circuits have held that "actual reliance" is not required.

On the other hand, the Third, Fourth, and Tenth Circuits have held that actual reliance is not required to show that a statute has an impermissible retroactive effect. Writing for the Third Circuit in *Ponnapula*, Judge Becker explained that cases like *Rankine* that "require actual reliance by the party seeking to avoid retroactive application" turn the *Landgraf* framework on its head by "erect[ing] too high a barrier to triggering the presumption against retroactivity." 373 F.3d at 489, 491. Indeed, the court noted, "[i]t is a strange 'presump-

tion' * * * that arises only on so heightened a showing as actual reliance." *Id.* at 491. Instead, the Third Circuit held that, at most, Supreme Court retroactivity precedent requires reasonable reliance, not actual reliance. *Id.* at 493. Accordingly, the Third Circuit held that "because aliens * * * who affirmatively turned down plea agreements had a reliance interest in the potential availability of § 212(c) relief, * * * IIRIRA's repeal of § 212(c) is impermissibly retroactive with respect to such aliens."

More recently, the Tenth Circuit reached a similar conclusion in *Hem*. After a thorough examination of this Court's retroactivity precedent and the current circuit split, the Tenth Circuit concluded that it "[could not] follow [its] sister circuits that impose a requirement of subjective/actual reliance," citing *Rankine*, *Dias*, and *Brooks* as examples. *Hem*, 458 F.3d at 1191-92, 1196. Instead, the court held that "objectively reasonable reliance on prior law is sufficient to sustain a retroactivity claim." *Id.* at 1197. Applying this holding, the court concluded that the petitioner, who had been convicted of an aggravated felony after a jury trial and had not appealed his conviction, was entitled to seek § 212(c) relief. *Ibid.* The court reasoned that aliens who did not appeal their convictions may have wished to avoid the risk of additional charges or a longer sentence on remand that would render them ineligible for § 212(c) relief. *Ibid.* Thus, it concluded that applying IIRIRA § 304 to such aliens creates an impermissible retroactive effect. *Ibid.*; see also *Thaqi* v. *Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004) (noting that "under *St. Cyr*, the petitioner need not demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect.").

In an opinion written by Judge Luttig, the Fourth Circuit went a step further. After a thorough review of this Court's cases, the Fourth Circuit held in *Olatunji* that "reliance (whether subjective or objective) is not a requirement of impermissible retroactivity." 387 F.3d at 388-89. While noting

the "confusion" that has pervaded the circuit courts on this issue, the *Olatunji* court concluded that a careful reading of this Court's precedent reveals that the proper focus of retroactivity analysis is whether "a statute * * * *in fact* impose[s] new legal consequences on past actions." *Id.* at 390-91, 394. Simply put, "reliance, in any form, is irrelevant to the retroactivity inquiry." *Id.* at 396. Although *Olatunji* involved a different provision of IIRIRA (related to the inadmissibility of criminal aliens re-entering the United States), its reasoning applies with equal force to IIRIRA § 304.[8]

3. Confusion over the role of reliance has emerged outside of the immigration context.

This confusion over the role of reliance in statutory retroactivity analysis has not been confined to the immigration context. For example, a similar dispute has emerged in habeas cases. In addition to the changes AEDPA made to immigration law, the statute also imposed significant new restrictions on the filing of successive habeas petitions. As a result, petitioners who had already filed their first habeas petitions prior to AEDPA challenged the application of the new rules, arguing that they had an impermissible retroactive effect.

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[8] Notably, the Fourth Circuit in *Olatunji* took great pains to distinguish its own prior decision in *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002). See *Olatunji*, 387 F.3d at 392-93. In *Chambers*, the Fourth Circuit held that aliens like Rodriguez-Zapata were not eligible for § 212(c) relief based, in large part, on its conclusion that aliens who proceeded to trial "[did] not have a reliance interest comparable to that which was at the heart of *St. Cyr*." 307 F.3d at 290. Although the discussion of "reliance" pervades the Fourth Circuit's *Chambers* opinion, it unequivocally eschewed "reliance" as a relevant part of retroactivity analysis in *Olatunji*. This obvious inconsistency only serves to highlight the confusion that has emerged in the lower courts about the role of "reliance" in the Supreme Court's retroactivity framework.

In one such case, *In re Jones*, 226 F.3d 328, 331 (4th Cir. 2000), the Fourth Circuit noted that other circuits analyzing the retroactivity of AEDPA had defined "reliance" in "varying ways." For example, the Fifth and Seventh Circuits required a showing of "actual detrimental reliance" on pre-AEDPA habeas law. *Ibid.*; see *Graham* v. *Johnson*, 168 F.3d 762, 785-86 (5th Cir. 1999) (stating that "the focus of our retroactivity inquiry should be on the detrimental reliance * * * placed on pre-AEDPA law"); *Alexander* v. *United States*, 121 F.3d 312, 314 (7th Cir. 1997) (finding no impermissible retroactive effect because petitioner had not relied on prior law). The First Circuit went even further, requiring the petitioner to show not only actual detrimental reliance but also that reliance was "objectively reasonable." *Libby* v. *Magnusson*, 177 F.3d 43, 51 (1st Cir. 1999). By contrast, the Sixth Circuit required only that the party "might have acted differently had he known of the new consequence." *In re Hanserd*, 123 F.3d 922, 931-32 (6th Cir. 1997) (expressly rejecting actual reliance requirement); see also *In re Jones*, 226 F.3d at 331 (holding that Fourth Circuit requires "some form of reliance on pre-AEDPA law" but declining to define standard).

As these cases demonstrate, confusion over the proper role of reliance in retroactivity analysis has pervaded the lower courts beyond the immigration context. As Congress passes future statutes with uncertain retroactive application, courts will continue to struggle with whether (and, if so, how) reliance affects their retroactive scope. The Court should take this opportunity to resolve the dispute and ensure a uniform retroactivity standard.

Although this Court recently denied other petitions raising similar issues, this case is a better vehicle for decision. For instance, this Court recently denied a petition for certiorari in *Kelava* v. *Gonzales*, 127 S. Ct. 43 (2006). In *Kelava*, however, the petitioner was rendered ineligible for § 212(c) relief because he "engaged in" terrorist activity, not because he had been convicted of an aggravated felony. Brief For Re-

spondent in Opposition at 2, *Kelava v. Gonzales*, 127 S. Ct. 43 (2006) (No. 05-1312), 2006 WL 2365437. Moreover, the petitioner may not have been eligible for § 212(c) relief even under pre-IIRIRA law.[9] *Id.* at 4-5.

B. This Split Has Produced Different Outcomes Regarding Whether Aliens Convicted Of An Aggravated Felony After A Jury Trial Can Seek § 212(c) Relief.

If Rodriguez-Zapata's petition had been filed in the Third, Fourth, or Tenth Circuits, it would have been analyzed far differently and likely would have resulted in a different outcome. The Fifth Circuit and other circuits imposing an actual reliance requirement have uniformly held that aliens convicted of an aggravated felony by a jury are not eligible for § 212(c) relief. See *Hernandez-Castillo*, 436 F.3d at 520; *Rankine*, 319 F.3d at 100; *Dias*, 311 F.3d at 458; *Montenegro*, 355 F.3d at 1037; *Armendariz-Montoya*, 291 F.3d at 1121; *Brooks*, 283 F.3d at 1274. An almost exclusive focus on "detrimental reliance" has led these courts to conclude that aliens convicted after a jury trial did not have reliance interests comparable to those who, like the petitioner in *St. Cyr*, pled guilty to an aggravated felony. Thus, these courts have concluded that IIRIRA § 304(b) is not impermissibly retroactive as applied to aliens previously convicted by a jury.

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[9] This Court also recently denied petitions for certiorari in *Appel* v. *Gonzales*, 127 S. Ct. 659 (2006) and *Sidhu* v. *Gonzales*, 127 S. Ct. 495 (2006). While both cases involved retroactive application of IIRIRA § 304(b) to aliens convicted of an aggravated felony after a jury trial, both petitions presented narrower fact-bound questions. Neither petition squarely presented a question on the role of reliance in retroactivity analysis. See Petition for Writ of Certiorari at i, *Appel* (No. 06-72), 2006 WL 1994676 (question presented limited to aliens who affirmatively turned down a plea agreement before proceeding to trial); Petition for Writ of Certiorari at i, *Sidhu* (No. 06-140), 2006 WL 2136227 (question presented limited to § 212(c) context).

By contrast, the Third and Tenth Circuits have held that such aliens are still eligible for § 212(c) relief in certain circumstances. In *Ponnapula*, the Third Circuit held that aliens who had affirmatively turned down plea agreements remained eligible for § 212(c) relief because they "reasonably could have relied" on the availability of such relief in turning down the plea offer. 373 F.3d at 483.[10] In *Hem*, the Tenth Circuit also adopted a "reasonable reliance" standard and held that aliens who were convicted by juries and chose to forgo appeals of their convictions remained eligible for § 212(c) relief. 458 F.3d at 1199-1200. The court reasoned that, as a class, these aliens might have "reasonably been motivated by the availability of § 212(c) relief." *Id.* at 1199. Rodriguez-Zapata falls squarely within this class of aliens, as the record does not reflect that he ever appealed his conviction. Thus, his petition would almost certainly have been successful under Tenth Circuit law.

Rodriguez-Zapata's case also would have turned out differently under the Fourth Circuit's retroactivity analysis. No showing of reliance is required under Fourth Circuit law. See *Olatunji*, 387 F.3d at 388-89. Rather, the proper question is "simply whether the statute in question attached 'new legal consequences to events completed before its enactment.'" *Id.* at 390 (quoting *Landgraf*, 511 U.S. at 268). Here, the repeal of § 212(c) relief attached significant new legal consequences to Rodriguez-Zapata's conviction and his underlying conduct by converting possible deportation into certain deportation. *St. Cyr*, 533 U.S. at 325; see pp. 26-27, *infra*.

The retroactive application of § 212(c)'s repeal continues to have a significant impact on the many aliens subject to

[10] The record does not reflect whether Rodriguez-Zapata was ever offered a plea agreement. If the Court wishes to adopt the Third Circuit's reasoning in *Ponnapula*, this case should be remanded to the IJ for an evidentiary hearing on whether Rodriguez-Zapata was offered a plea agreement before he opted for a jury trial.

removal based on criminal convictions. See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2005 at 5 (2006) (noting that criminal aliens accounted for 43% of all removals in 2005), available at http://tinyurl.com/y8785n. This Court should resolve the disagreement among the circuits and end the inconsistent results in § 212(c) cases.

C. The Fifth Circuit's Holding Contravenes This Court's Retroactivity Precedent.

Not only does the Fifth Circuit's decision in this case contribute to an intractable circuit split, it also contravenes this Court's well-established retroactivity framework. A careful reading of *Landgraf* and its progeny reveals that "reliance" is merely a factor in assessing whether applying a statute creates an impermissible retroactive effect. *Landgraf* itself spoke in sweeping terms, noting that "statutory retroactivity has long been disfavored" and that "the presumption against retroactive legislation is deeply rooted in our jurisprudence." 511 U.S. at 265, 268. Thus, in the absence of express congressional intent, a court "must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70.

While the Court stated that "considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in such an inquiry, *Landgraf* by no means held that a showing of reliance is *required* to find an impermissible retroactive effect. 511 U.S. at 270. Instead, the Court relied on Justice Story's oft-quoted definition of a retroactive statute:

> every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective * * *.

Id. at 269 (internal quotation marks omitted). Thus, as the Court summarized, the proper inquiry is whether a new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. Notably, the term "reliance" appears nowhere in these formulations of retroactivity.

Even more importantly, the facts of *Landgraf* itself demonstrate that reliance is not a requirement. In *Landgraf*, the Court considered whether the addition of compensatory and punitive damages remedies to Title VII suits in the Civil Rights Act of 1991 could be applied retroactively to conduct that occurred before the passage of the statute. 511 U.S. at 247. The Court acknowledged that "concerns of unfair surprise and upsetting expectations are attenuated in the case of intentional employment discrimination." *Id.* at 282 n.35. Nevertheless, the Court concluded that the new statute could not be applied retroactively because increasing a party's monetary liability for past actions "would attach an important new legal burden to that conduct." *Id.* at 283. The Court made little mention of the defendant's reliance—subjective or objective—on the prior state of the law. See *id.* at 280-93; see also *Ponnapula*, 373 F.3d at 491 (noting that the defendant in *Landgraf* "*is not even mentioned* in the pertinent section of the Court's opinion").

Similarly, in *Hughes Aircraft*, this Court used the *Landgraf* framework to block retroactive application of a new statute without mentioning reliance. There, the statute at issue enlarged the class of potential private plaintiffs that could bring suit under the False Claims Act. *Hughes Aircraft*, 520 U.S. at 941-42. The Court held that applying the new statute to actions completed before its passage would have a retroactive effect because it removed a defense to a False Claims Act suit and "chang[ed] the substance of the existing cause of action." *Id.* at 948. The Court reached this conclusion in the abstract, without *any* discussion of whether the

parties before the Court actually relied—or even whether similarly situated parties could reasonably have relied—on the prior state of the law. *Id.* at 946-51; see *Olatunji*, 387 F.3d at 391 (noting the absence of "reliance" as a factor in *Hughes Aircraft*).

St. Cyr did nothing to alter this line of precedent. To be sure, this Court in *St. Cyr* spent considerable time discussing the *quid pro quo* nature of plea agreements and the fact that many aliens pled guilty in reliance on the continued availability of § 212(c) relief. Yet the Court discussed these factors only as *evidence* that applying IIRIRA § 304 retroactively would "attach[] a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321. As this Court explained in its recent decision in *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2431 (2006), the *St. Cyr* court concluded that "converting deportation from a likely possibility to a dead certainty would add such a burden, and application of the new law was accordingly barred." Further, *Fernandez-Vargas* did not impose any reliance requirement; it simply reaffirmed the *Landgraf* framework. *Id.* at 2428.

If "reliance" were in fact a required element of retroactivity analysis, surely this Court would not have neglected to so state in one of its many post-*Landgraf* decisions. Yet in no case has the Court purported to make reliance—let alone actual reliance—a prerequisite for finding that retroactive application of a statute is impermissible. To the contrary, this Court has held that a statute has an impermissible retroactive effect without even considering reliance on prior law. *Hughes Aircraft*, 520 U.S. at 946-51; see also *Rivers* v. *Roadway Express, Inc.* 511 U.S. 298, 304-13 (1994). Because the Fifth Circuit contravened this Court's deeply-rooted presumption against retroactivity by requiring Rodriguez-Zapata to prove actual reliance on prior law to avoid retroactive application of IIRIRA § 304(b), this Court should grant certiorari and reverse.

II. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER THE RIGHT TO SEEK § 212(C) RELIEF IS PROTECTED BY THE DUE PROCESS CLAUSE.

The Fifth Circuit also rejected Rodriguez-Zapata's assertion that denial of a § 212(c) merits hearing violated his due process rights. The court held that the right to seek § 212(c) relief is not subject to due process protections, relying exclusively on its prior decision in *Lopez-Ortiz*. This holding is directly contrary to decisions of the Second and Ninth Circuits, which have held that the right to seek § 212(c) relief is protected by due process. Because of the important constitutional interest at stake, this Court should grant certiorari to resolve the disagreement among the circuits.

A. Several Circuits, Including The Fifth Circuit, Have Held That The Right To Seek § 212(c) Relief Is Not Protected By Due Process.

The Fifth Circuit, along with five other circuits, has held that aliens have no due process interest in the right to seek § 212(c) relief. In reaching that conclusion, these courts have focused on the discretionary nature of § 212(c) relief. The Fifth Circuit's decision in *Lopez-Ortiz*, cited as controlling precedent in this case, is representative. There, the petitioner asserted that his removal hearing for illegal re-entry was fundamentally unfair because the IJ failed to inform him of his right to seek § 212(c) relief. *Lopez-Ortiz*, 313 F.3d at 230. The Fifth Circuit disagreed, holding that the right to seek § 212(c) relief did not warrant due process protection. *Id.* at 231. The court reasoned that "[a]s a piece of legislative grace, it conveyed no rights, it conferred no status." *Ibid.* (internal quotation marks omitted). Thus, the Fifth Circuit concluded that "eligibility for § 212(c) relief is not a liberty or property interest warranting due process protection." *Ibid.*[11]

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[11] *Lopez-Ortiz* arose in the context of removal proceedings for illegal re-entry under 8 U.S.C. § 1326, as did the other cases cited in

Five other circuits agree. For instance, in *United States* v. *Torres*, 383 F.3d 92, 104 (3d Cir. 2004), the Third Circuit concluded that "because discretionary relief is necessarily a matter of grace rather than of right, aliens do not have a due process liberty interest in consideration for such relief." Likewise, the Seventh Circuit noted in *United States* v. *Roque-Espinoza*, 338 F.3d 724, 729 (7th Cir. 2003), that "it would be hard to show that the loss of a chance at wholly discretionary relief from removal is the kind of deprivation of liberty or property that the due process clause is designed to protect." The Seventh Circuit has since directly addressed the issue, holding that the right to be considered for discretionary relief is not protected by due process. See *United States* v. *Santiago-Ochoa*, 447 F.3d 1015, 1020 (7th Cir. 2006); see also *Smith* v. *Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002) (holding that alien "had no protected liberty or property interest in discretionary 212(c) relief"); *Oguejiofor* v. *Att'y Gen. of the United States*, 277 F.3d 1305, 1309 (11th Cir. 2002) (per curiam) ("[A]n alien has no constitutionally-protected right to discretionary relief or to be eligible for discretionary relief."); *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004).[12]

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this section. As this case shows, however, courts also apply the due process holdings of these decisions to cases involving removal of aliens convicted of an aggravated felony. See also *Bonhometre* v. *Gonzales*, 414 F.3d 442, 448 n.9 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1362 (2006).

[12] Two other circuits have held that the right to seek suspension of deportation, a related form of pre-IIRIRA discretionary relief for non-LPRs, is not protected by due process. See *Ashki* v. *I.N.S.*, 233 F.3d 913, 921 (6th Cir. 2000) ("Eligibility for suspension is not a right protected by the Constitution. * * * Because suspension of deportation is discretionary, it does not create a protectible liberty or property interest."); *Escudero-Corona* v. *I.N.S.*, 244 F.3d 608, 615 (8th Cir. 2001) (same).

B. The Second And Ninth Circuits Have Recognized That The Right To Seek § 212(c) Relief Is Protected By Due Process.

Both the Second and Ninth Circuits have held, however, that eligibility for § 212(c) relief is subject to due process protection. Because these decisions create an intractable circuit split, this Court should step in to resolve the conflict.

In *United States* v. *Copeland*, 376 F.3d 61, 72 (2d Cir. 2004), the Second Circuit recognized that the right to seek § 212(c) relief is subject to constitutional protection. The question in *Copeland* was whether the failure of an immigration judge to inform an alien of his right to seek § 212(c) relief rendered his removal hearing "fundamentally unfair." *Id.* at 71. Noting the circuit split, the Second Circuit expressly rejected the view that simply because § 212(c) relief is discretionary, it is not entitled to any constitutional protection. *Id.* at 71-72. To the contrary, the court pointed out that the "the right to a Section 212(c) *hearing* is well established and mandatory, whether or not the ultimate granting of *relief* is discretionary." *Id.* at 72 (emphasis added).

The Second Circuit's reasoning turned on the "distinction between a right to *seek* relief and the right to that relief *itself*," a distinction that this Court has also recognized. *Copeland*, 376 F.3d at 72 (emphasis added); see *St. Cyr*, 533 U.S. at 307 ("Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion on the other hand."). The *Copeland* court criticized other circuits for failing to recognize the distinction. 376 F.3d at 72. By "collaps[ing] this distinction," the court explained, those circuits "incorrectly assume that, because the grant of Section 212(c) relief is itself discretionary, the denial of a Section 212(c) hearing cannot be a fundamental procedural error." *Ibid.*; see also *Edwards* v. *I.N.S.*, 393 F.3d 299, 308 (2d Cir. 2004) (citing *Copeland* for proposition that "an erroneous denial of the op-

portunity to apply for § 212(c) relief may constitute a due process violation").

The Ninth Circuit also has held that eligibility for § 212(c) relief is subject to due process protections. As in *Copeland*, the petitioner in *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir. 2004), argued that the failure of the IJ to inform him of his right to seek § 212(c) relief violated his due process rights. The Ninth Circuit agreed, explaining that "[t]he requirement that the IJ inform an alien of his or her ability to apply for relief from removal is 'mandatory.'" *Id.* at 1050. Thus, "failure to so inform the alien [of his or her eligibility for relief from removal] is a denial of due process that invalidates the underlying deportation proceeding." *Ibid.* (internal quotation marks omitted). Under this analysis, the IJ's statement that Rodriguez-Zapata was not eligible for § 212(c) relief (App., *infra*, 6a), which was erroneous for the reasons explained below, is likewise a denial of due process.

Several courts have recognized the existence of this circuit split. See, *e.g.*, *United States* v. *Charleswell*, 456 F.3d 347, 359 n.13 (3d Cir. 2006); *United States* v. *Luna*, 436 F.3d 312, 319-20 (1st Cir. 2006); *Copeland*, 376 F.3d at 70 (noting "disagreement among the circuits" on the issue). Most circuits have now weighed in on the issue, making it ripe for this Court's review. Although the Court recently denied two petitions raising the circuit split over due process protection for § 212(c) eligibility, those cases were hindered by procedural and factual complications not present here.[13] The Court

[13] See Brief For Respondent in Opposition at 5-6, *Patel* v. *Gonzales*, 545 U.S. 1103 (2005) (No. 04-682), 2005 WL 1123568 (raising jurisdictional challenge because court of appeals never ruled on due process question and petitioner failed to exhaust administrative remedies); Petition for Writ of Certiorari at 7-8, *Zamora-Garcia* v. *Gonzales*, 127 S. Ct. 380 (2006) (No. 05-1519), 2006 WL 1502925 (framing due process claim in terms of ineffective assistance of counsel).

should grant this petition to resolve the circuit split on this important constitutional question.

III. ALIENS CONVICTED OF AN AGGRAVATED FELONY BY A JURY PRIOR TO IIRIRA ARE ENTITLED TO SEEK § 212(C) RELIEF.

The Fifth Circuit's decision in this case should be reversed because LPRs convicted of an aggravated felony by a jury prior to the passage of IIRIRA remain eligible for § 212(c) relief. Application of IIRIRA § 304(b) to these aliens has an impermissible retroactive effect and deprives them of due process.

A. Applying IIRIRA § 304(b) To LPRs Convicted By A Jury Prior To IIRIRA Creates An Impermissible Retroactive Effect.

Contrary to the decisions below, applying IIRIRA § 304(b) to Rodriguez-Zapata results in a harsh and impermissible retroactive effect. This Court's opinion in *Landgraf* established a two-part test for determining whether a statute is impermissibly retroactive. 511 U.S. at 280. First, a court must determine whether Congress has "expressly prescribed the statute's proper reach." *Ibid.* Because this Court held in *St. Cyr* that Congress has not expressly prescribed the temporal reach of IIRIRA § 304, only the second step of the *Landgraf* analysis is relevant here. *St. Cyr*, 533 U.S. at 320. That step requires examination of:

> whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

Landgraf, 511 U.S. at 280. If so, the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Ibid.*

Since *St. Cyr*, many courts have concluded that IIRIRA § 304 does not have an impermissible retroactive effect on

aliens convicted by a jury given their purported lack of "reliance" on prior law. As explained on pages 18-20, *supra*, however, a proper reading of this Court's precedent reveals that reliance is merely one factor in a retroactivity analysis.[14]

The correct retroactivity inquiry centers on "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270. The appropriate "relevant past event" in this case is *not* Rodriguez-Zapata's decision to go to trial, but rather his underlying criminal conduct or, in the alternative, his actual conviction. See *id.* at 282-83 (identifying underlying conduct as relevant past event); *Thom* v. *Ashcroft*, 369 F.3d 158, 167-69 (2d Cir. 2004), *cert. denied*, 126 S. Ct. 40 (2005) (Underhill, J., dissenting) (asserting that "relevant past event" is the conviction itself). Viewed from either vantage point, the application of IIRIRA § 304 to Rodriguez-Zapata undoubtedly "attaches new legal consequences to events completed before its enactment."

At the time Rodriguez-Zapata committed his underlying crime, he faced imprisonment and possible deportation. IIRIRA's elimination of § 212(c) relief for all aggravated felons converted *possible* deportation into *certain* deportation by eliminating any chance for § 212(c) relief. As this Court recognized in *St. Cyr*:

> There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.

---

[14] Even if reliance is required, at most, this Court's precedent requires a showing of "reasonable reliance." See *Hem*, 458 F.3d at 1191; *Ponnapula*, 373 F.3d at 493; *In re Hanserd*, 123 F.3d 922, 932 n.17 (6th Cir. 1997) (noting that "conscious reliance on an old law is relevant" but "has never been the touchstone of retroactivity analysis"). Because Rodriguez-Zapata did not appeal his conviction, he fits squarely within the class of aliens defined in *Hem* and thus remains eligible for § 212(c) relief.

533 U.S. at 325. Whether viewed as "attach[ing] a new disability, in respect to transactions or considerations already past" or "increas[ing] a party's liability for past conduct," eliminating § 212(c) relief drastically altered the consequences of Rodriguez-Zapata's crime. See *Landgraf*, 511 U.S. at 269, 280.

In the alternative, this Court should consider Rodriguez-Zapata's conviction as the relevant past event. At the moment of Rodriguez-Zapata's conviction, he became subject to *possible* deportation. See 8 U.S.C. § 1227(a)(2)(A)(iii). When IIRIRA eliminated all discretionary relief for aliens convicted of an aggravated felony, however, Rodriguez-Zapata became subject to *certain* deportation. As in *Hughes Aircraft*, IIRIRA essentially eliminated a defense to removal. See *Hughes Aircraft*, 520 U.S. at 948 (noting that elimination of a defense "attach[ed] a new disability" to past events). The conversion of possible deportation into certain deportation is precisely the type of "new legal consequence" that renders a statute impermissibly retroactive under the *Landgraf* framework. See *Landgraf*, 511 U.S. at 269-70.

In sum, whether viewed at the time of Rodriguez-Zapata's underlying conduct or at the time of his conviction, IIRIRA § 304 "attach[ed] new legal consequences," "increase[ed]* * *liability for past conduct," and "swe[pt] away settled expectations" attendant to a relevant past event. See *Landgraf*, 511 U.S. at 266, 268, 270, 279-80. Absent an express statement of congressional intent—which this Court has held does not exist for IIRIRA § 304—*Landgraf* dictates that such a statute must not be applied to "cases arising before its enactment." *Id.* at 286. Thus, Rodriguez-Zapata remains eligible for § 212(c) relief and this Court should grant certiorari to reverse the Fifth Circuit's erroneous decision.

B. Denial Of The Right To Seek § 212(c) Relief Is A Violation Of Due Process.

By denying Rodriguez-Zapata the opportunity to apply for § 212(c) relief, the IJ and BIA also deprived him of due

process. This Court has long recognized that aliens are protected by the Due Process Clause. See *Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976). Due process protections apply "when government action deprives a person of liberty or property." *Greenholtz* v. *Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). Thus, the threshold inquiry is whether Rodriguez-Zapata has a "life, liberty, or property" interest sufficient to invoke due process protections. See *Bd. of Regents* v. *Roth*, 408 U.S. 564, 571 (1972). As this Court and others have recognized, significant liberty interests are at stake in removal proceedings. See *Bridges v. Wixon*, 326 U.S. 135, 155 (1945); see also *Kaweesa v. Gonzales*, 450 F.3d 62, 69 (1st Cir. 2006) ("The liberty interests involved in removal proceedings are of the highest order.") (quoting *Lanza v. Ashcroft*, 389 F.3d 917, 927 (9th Cir. 2004)).

While there is no question that Rodriguez-Zapata does not have a protected interest in *receiving* § 212(c) relief, at the moment of his conviction, he gained a protected interest in the right to *seek* § 212(c) relief. See *St. Cyr*, 533 U.S. at 314-15 (noting that alien became both subject to deportation and eligible for § 212(c) relief at the time of his guilty plea). Despite the Fifth Circuit's focus on the discretionary nature of § 212(c) relief, this Court has made clear that aliens have a meaningful interest in the right to seek relief. As the Court stated in *St. Cyr*:

> [T]he fact that § 212(c) relief is discretionary does not affect the propriety of our conclusion. There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.

Id. at 325; see also *Goncalves* v. *Reno*, 144 F.3d 110, 128 (1st Cir. 1998) (stating that § 212(c) is "a form of relief that, while discretionary, is plainly substantive"). As the Second Circuit noted in *Copeland*, the Court in *St. Cyr* "recognized the importance of being able to seek [§ 212(c)] relief and that

the right to seek such relief, even if discretionary, cannot be lightly revoked." 376 F.3d at 73.

The importance of § 212(c) relief is underscored by the manner in which it has been administered by the IJs and the BIA. Contrary to the suggestion of some courts, the exercise of discretion in granting § 212(c) relief has not been completely unfettered. In *In re Marin*, 16 I & N Dec. at 584, the BIA established a list of factors traditionally considered in determining whether § 212(c) relief was warranted. This Court has noted that the factors established by the BIA in *Marin* and subsequent cases are "comparable to common-law rules." *St. Cyr*, 533 U.S. at 296 n.5. Thus, § 212(c) relief has been "predictably granted" when such factors are present. *Ponnapula*, 373 F.3d at 486. In similar circumstances, this Court has recognized that discretionary relief can give rise to a constitutionally protected interest.[15]

In sum, the Fifth Circuit failed to acknowledge the critical distinction between the right to *seek* discretionary relief and the right to *receive* it, a distinction that this Court and others have recognized. See *St. Cyr*, 533 U.S. at 307 ("Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion on the other hand."); see also *Torres*, 383 F.3d at 105 (noting same distinction); *Copeland*, 376 F.3d at 72; *Arevalo* v. *Ashcroft*, 344 F.3d 1, 15 (1st Cir. 2003) ("A right to seek relief is analytically separate and distinct from a right to the relief itself."). As the Second and Ninth Circuits have held, the right to seek relief is properly subject to due process protections. See pp. 22-24, *supra*.

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[15] In *Greenholtz*, the Court held that prisoners were entitled to due process protection under a state parole statute because the statute created a "legitimate expectation of release absent the requisite finding that one of the [statutory conditions] exist[ed]." 442 U.S. at 12.

Despite Rodriguez-Zapata's constitutionally protected right to seek § 212(c) relief, he has been afforded no opportunity to do so. The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). He has never been afforded any opportunity—let alone a "meaningful" one—to vindicate that right. Rodriguez-Zapata has never been afforded a hearing on the merits of his § 212(c) petition, even though a merits hearing is obviously at the heart of any meaningful opportunity to seek discretionary relief. By denying Rodriguez-Zapata any opportunity to present his substantial evidence on the merits, the IJ and the BIA have deprived him of the right to seek § 212(c) relief in violation of the Due Process Clause of the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2007

APPENDIX

APPENDIX A

United States Court of Appeals
Fifth Circuit

FILED
August 3, 2006
Charles R. Fulbruge III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60778
Summary Calendar

ANTONIO RODRIGUEZ-ZAPATA,

Petitioner,

Versus

ALBERTO R. GONZALES, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
(BIA No. A36 743 567)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:*

Antonio Rodriguez-Zapata (Rodriguez) filed a 28 U.S.C. § 2241 petition challenging a final order of deportation. The district court properly transferred the petition to this court. *See* REAL ID Act, Pub. L. No. 109-13, 199 Stat. 213, 311 (2005); 8 U.S.C. § 1252; *Rosales v. Bureau of Immigration and Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1055 (2006). Pursuant to the REAL ID Act, we consider Rodriguez's § 2241 petition as a timely petition for review. *See Rosales*, 426 F.3d at 736.

Rodriguez asserts that retroactive application of the repeal of Immigration and Nationality Act (INA) § 212(c), 8 U.S.C. § 1182(c), to his case was impermissible; that the denial of INA § 212(c) relief to him violates due process; and that the denial of an INA § 212(c) merits hearing violates his due process. Rodriguez's arguments are without merit.

In *Hernandez-Castillo v. Moore*, 436 F.3d 516, 517, 519-20 (5th Cir.), *petition for cert. filed*, 74 U.S.L.W. 3572 (U.S. March 28, 2006) (No. 05-1251), we concluded that application of the Illegal Immigration Reform and Immigration Responsibility Act's repeal of INA § 212(c) to aliens who, like Rodriguez, went to trial and were convicted of an aggravated felony prior to the repeal of § 212(c), did not create an impermissible retroactive effect. Additionally, in *United States v. Lopez-Ortiz*, 313 F.3d 225, 230-31 (5th Cir. 2002), we held that eligibility for discretionary relief under INA § 212(c) is not an interest warranting constitutional due process protection.

Accordingly, Rodriguez's petition for review is DENIED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia
22041

File: A36-743-567-HARLINGEN Date: Dec. 10, 2003

In re: RODRIGUEZ ZAPATA, ANTONIO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Waddle, Paula

ON BEHALF OF DHS: Lessa N. Whatmough, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

s/ *Roger A. Paul*
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Harlingen, Texas

File No.: A 36 743 567 September 13, 2002

In the Matter of	)	
ANTONIO RODRIGUEZ ZAPATA	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE: Immigration and Nationality Act Section 237(a)(2)(A)(iii), as amended, in that at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43) of the Act.

APPLICATIONS: Section 212(c) waiver of inadmissibility.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Paula Waddle	Tom Bernstein

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male native and citizen of Mexico. Respondent was originally admitted to the United States as a lawful permanent resident on or about May 5, 1981. The Immigration and Naturalization Service, hereafter Service, issued a Notice to Appear, dated June 27, 2001, in the name of the respondent.

The Notice to Appear is marked as Exhibit No. 1 in the record. In the Notice to Appear, hereafter the NTA, the Service alleges that the respondent is removable on the charge set forth above. That is, the respondent has been convicted of an aggravated felony.

During the proceedings, the respondent appeared with counsel, admitted the truth of the factual allegations in the NTA, and conceded removability on the charge set forth above. The Service then presented conviction documents, which have been marked and admitted into the record as Exhibit No. 2. The evidence presented does establish that respondent was convicted on October 18, 1995 in the 103rd District Court in Cameron County, Texas for the offense of indecency with a child in violation of Texas Penal Code. Exhibit No. 2 does reflect that respondent pled not guilty before a jury. Respondent was found guilty as reflected in Exhibit No. 2, page 6. The jury found respondent guilty of indecency with a child as charged, and as reflected on page 9 of Exhibit No. 2, the respondent was sentenced to ten years probation with a fine of $2,000.

Upon the basis of the respondent's admissions and respondent's concession of removability and the documentary evidence of record, I conclude that removability has been established by evidence that is clear and convincing. During the course of proceedings, the respondent designated Mexico as the country of removal in the event removal were to be ordered. The respondent then requested relief in the form of a 212(c) waiver of inadmissibility. Respondent has submitted an application for 212(c), waiver of inadmissibility, as was applicable prior to 1996, prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996. The respondent has requested the waiver of 212(c) relying upon *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). Respondent had been convicted of an aggravated felony, but the conviction happened prior to April 24, 1996, which should make respondent eligible for 212(c). The only problem is that in order for respondent to be eligible, he must have pled guilty prior to that date of April 24, 1996, but as is reflected in the documentary evidence of record, specifically Exhibit No. 2, respondent did not plead guilty. Instead respondent was tried before a jury and was convicted by the jury and sentenced by that jury.

Therefore, the Court finds the respondent would not be eligible, and is not eligible, for that form of relief. The Supreme Court of the United States determined that the restrictions on 212(c) relief do not apply retroactively to aliens who have pled guilty prior to that April 24, 1996. Respondent did not plead guilty. Instead he was found guilty by a jury. As such, the Court has no option but to find the respondent not eligible for that form of relief, and at this time does pretermit the respondent's application for 212(c).

For the record, the Court has marked as Group Exhibit No. 3 the documents, including the Form I-191, which has been properly fee'd and properly filed with the Court, with proper documentation, a large number of documents and a great deal of documents reflecting the respondent has paid the fee and has properly requested the 212(c) relief. Respondent also has, and the Court does states this, that the respondent did present himself today with a large number of witnesses. Nonetheless, the Court has no option but to pretermit respondent's request for relief pursuant to 212(c), as respondent is not eligible for that form of relief as he did not plead guilty. Instead he was found guilty by a jury. As such, the Court will enter the following orders.

ORDER

IT IS HEREBY ORDERED the respondent is not eligible for the requested relief of 212(c).

IT IS FURTHER ORDERED the respondent is subject to removal.

IT IS FURTHER ORDERED the respondent is removable under Section 237(a)(2)(A)(iii) of the Immigration Act as having been convicted of an aggravated felony.

IT IS FURTHER ORDERED that respondent's application for 212(c), waiver of inadmissibility, is hereby pretermitted.

IT IS HEREBY ORDERED the respondent is ordered removed to Mexico on the charges contained in the Notice to Appear.

s/ Eleazar R. Tovar
ELEAZAR R. TOVAR
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE ELEAZAR R. TOVAR, in the matter of:

ANTONIO RODRIGUEZ ZAPATA

A 36 743 567

Harlingen, Texas

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

s/ Nancy Cartino
Nancy Cartino, Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

October 17, 2002
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

APPENDIX D

United States Court of Appeals

FILED
Oct. 4, 2006

Charles R. Fulbruge III, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60778

ANTONIO RODRIGUEZ-ZAPATA,

Petitioner,

v.

ALBERTO R. GONZALES, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

(Opinion 08/3/06, 5 Cir. _____, _____ F.3d _____)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ *Jacques L. Wiener*
United States Circuit Judge

REHG-7a

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

APPENDIX E

United States Code

8 U.S.C. § 1182(c) (1994 ed.): (excerpts)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (1) (other than paragraphs (3) and (9)(C)) * * *. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. § 1229b(a): (excerpts)

(a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

IIRIRA

§ 304(b): REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

U.S. Constitution

Amendment V: (excerpts)

No person shall . . . be deprived of life, liberty, or property, without due process of law * * *.

FILED
MAY 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-929

In the Supreme Court of the United States

ANTONIO RODRIGUEZ-ZAPATA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
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QUESTIONS PRESENTED

As a result of 1996 amendments to the Immigration and Nationality Act, a removable alien is ineligible for discretionary relief from removal if the alien was previously convicted of an aggravated felony. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held, based on principles of non-retroactivity, that the 1996 amendments do not apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether the holding of *St. Cyr* applies to an alien convicted of an aggravated felony after trial.

2. Whether the right to seek discretionary relief from removal is protected by the Due Process Clause of the Fifth Amendment.

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In the Supreme Court of the United States

No. 06-929

ANTONIO RODRIGUEZ-ZAPATA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted at 193 Fed. Appx. 312. The decisions of the Board of Immigration Appeals (Pet. App. 3a) and the immigration judge (Pet. App. 4a-7a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2006. A petition for rehearing was denied on October 4, 2006 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on January 3, 2007 (the Court was closed on January 2). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was construed to apply to deportation proceedings as well. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In the Immigration Act of 1990, Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. See Pub. L. No. 101-649, Tit. V, § 511, 104 Stat. 5052. Subsequently, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including an aggravated felony, without regard to the amount of time spent in prison. See Pub. L. No. 104-132, Tit. IV, § 440(d), 110 Stat. 1277. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), see Pub. L. No. 104-208, Tit. III, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b (1996), which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A makes aggravated felons ineligible for discretionary relief. See 8 U.S.C. 1229b(a)(3). In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated

felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

2. Petitioner is a native and citizen of Mexico. In 1981, he was admitted to the United States as a lawful permanent resident. In 1995, a jury found petitioner guilty of indecency with a child, in violation of Texas law. He was sentenced to 10 years of probation and a fine of $2000. In 2001, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner.* It alleged that he was removable because the offense of which he was convicted was an aggravated felony. Pet. App. 4a-5a; see 8 U.S.C. 1101(a)(43)(A), 1227(a)(2)(A)(iii).

Petitioner conceded that he was removable but sought discretionary relief from removal under Section 212(c) of the INA. The immigration judge (IJ) ruled that Section 212(c) relief is unavailable to an alien convicted of an aggravated felony before the 1996 amendments to the INA if the alien was convicted after trial. Because petitioner was convicted after trial, the IJ found that his application for Section 212(c) relief was pretermitted and ordered him removed to Mexico. Pet. App. 4a-7a.

The Board of Immigration Appeals affirmed the IJ's decision without opinion. Pet. App. 3a.

3. Petitioner then filed a petition for a writ of habeas corpus. Pet. App. 2a. He argued that applying the 1996 amendments to the INA in his case was impermissibly retroactive and that denying him relief and a hearing

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* The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

under Section 212(c) violated due process. *Ibid.* Pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106, 119 Stat. 310-311, the district court transferred the petition to the court of appeals, which treated it as a petition for review. Pet. App. 2a.

The court of appeals denied the petition in an unpublished per curiam opinion. Pet. App. 1a-2a. Relying on *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (5th Cir.), cert. denied, 127 S. Ct. 40 (2006), the court held that "application of the [IIRIRA's] repeal of INA § 212(c) to aliens who, like [petitioner], went to trial and were convicted of an aggravated felony prior to the repeal of § 212(c), did not create an impermissible retroactive effect." Pet. App. 2a. And, relying on *United States* v. *Lopez-Ortiz*, 313 F.3d 225 (5th Cir. 2002), cert. denied, 537 U.S. 1135 (2003), the court held that "eligibility for discretionary relief under INA § 212(c) is not an interest warranting constitutional due process protection." Pet. App. 2a.

ARGUMENT

1. Petitioner contends (Pet. 10-20, 25-27) that the holding of *St. Cyr*, which involved aliens convicted of an aggravated felony through a plea agreement, should be extended to aliens convicted after trial. The court of appeals correctly held otherwise, and further review is unwarranted. Indeed, this Court has already denied petitions raising the claim that petitioner raises in at least six prior cases, and it has denied three such petitions in the last seven months alone. See *Appel* v. *Gonzales*, 127 S. Ct. 659 (2006); *Sidhu* v. *Gonzales*, 127 S. Ct. 495 (2006); *Hernandez-Castillo* v. *Gonzales*, 127 S. Ct. 40 (2006); *Thom* v. *Gonzales*, 126 S. Ct. 40 (2005);

Stephens v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005).

a. In *St. Cyr*, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. See *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2431-2432 & n.10 (2006) (reaffirming *quid pro quo* basis for *St. Cyr*'s holding).

The decision below relied (Pet. App. 2a) upon *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (5th Cir.), cert. denied, 127 S. Ct. 40 (2006), which itself "adopt[ed] th[e] reasoning" (*id.* at 520) of *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003). In *Rankine*, the Second Circuit correctly concluded that "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." 319 F.3d at 99. As the court explained in *Rankine*, unlike an alien who pleaded guilty,

an alien who went to trial did not "detrimentally change[] his position in reliance on continued eligibility for § 212(c) relief." *Ibid.* An alien who pleaded guilty made a decision "to abandon any rights and admit guilt —thereby immediately rendering [himself] deportable—in reliance on the availability of the relief offered prior to IIRIRA." *Ibid.* An alien who went to trial, by contrast, did so "to challenge the underlying crime that could render [him] deportable and, had [he] succeeded, § 212(c) relief would be irrelevant." *Id.* at 99-100. In short, as *Rankine* correctly recognized, it is "the lack of detrimental reliance on § 212(c) by those aliens who chose to go to trial" that "puts them on different footing than aliens like St. Cyr." *Id.* at 102.

b. Petitioner contends (Pet. 18-20) that the decision below is inconsistent with this Court's retroactivity precedents, which establish that the ultimate question is whether the statute at issue attaches new legal consequences to events completed before its enactment and treat reliance as merely a factor to be considered in answering that question. That contention is mistaken.

The most relevant of this Court's retroactivity precedents is of course *St. Cyr*, which, like this case, addressed the question whether the 1996 amendments to the INA can be applied to bar the availability of Section 212(c) relief to an alien convicted before the amendments' effective date. Following earlier decisions of this Court, *St. Cyr* makes clear that "[t]he inquiry into whether a statute operates retroactively demands a commonsense functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" 533 U.S. at 321 (quoting *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999), in turn quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244,

270 (1994)). And, following earlier decisions of this Court, *St. Cyr* makes clear that "the judgment whether a particular statute acts retroactively 'should be informed and guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations."'" *Ibid.* (quoting *Martin*, 527 U.S. at 358, in turn quoting *Landgraf*, 511 U.S. at 270). Applying those principles, *St. Cyr* holds that "IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly 'attaches a new disability, in respect to transactions or considerations already past,'" principally because "[p]lea agreements involve a *quid pro quo*." *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269, in turn quoting *Society for the Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814) (No. 13,156) (Story, J.)); see *id.* at 321-325 (emphasizing reliance interest of aliens who entered into plea agreement before 1996 amendments).

The court of appeals' decision in *Hernandez-Castillo*, on which it relied here, is entirely consistent with *St. Cyr*'s retroactivity analysis. *Hernandez-Castillo* explicitly states that "there is an impermissible retroactive effect where the application of the statute 'attaches new legal consequences to events completed before [the statute's] enactment.'" 436 F.3d at 519 (quoting *Landgraf*, 511 U.S. at 270) (brackets in original). Quoting the Second Circuit's decision in *Rankine*, *Hernandez-Castillo* then goes on to say that aliens who pleaded guilty "participated in the *quid pro quo* relationship" that "gave rise to the reliance interest" found by "the Supreme Court in *St. Cyr*" to have "produced the impermissible retroactive effect of IIRIRA," whereas aliens convicted after trial "neither did anything nor surrendered any

rights that would give rise to a comparable reliance interest." *Id.* at 520 (quoting 319 F.3d at 100).

c. In addition to the Second Circuit (in *Rankine*) and the Fifth Circuit (in *Hernandez-Castillo*), five other courts of appeals have declined to extend the holding of *St. Cyr* to aliens convicted after trial. See *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam), cert. denied, 539 U.S. 926 (2003); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002); *Montenegro* v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (per curiam); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Brooks* v. *Ashcroft*, 283 F.3d 1268 (11th Cir. 2002). Petitioner contends (Pet. 10-18) that *Rankine*, *Hernandez-Castillo*, and the other decisions conflict with *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004), *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004), and *Hem* v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006). That contention is likewise mistaken.

i. Like the decision below, the Third Circuit's decision in *Ponnapula* addressed the question whether the 1996 amendments to the INA apply to aliens found guilty at trial before 1996, but it did not hold that the amendments do not apply to *any* alien found guilty at trial. The Third Circuit framed the question to be decided in *Ponnapula* as "what aliens—if any—who went to trial and were convicted did so in reasonable reliance on the availability of § 212(c) relief." 373 F.3d at 494. The court observed that, "[g]enerally speaking, reliance interests (in the legal sense) arise because some choice is made evincing reliance." *Ibid.* The court thus divided the category of "aliens who went to trial and were convicted prior to the effective date of IIRIRA's repeal of former § 212(c)" into (1) "aliens who went to trial because they declined a plea agreement that was offered

to them," and (2) "aliens who went to trial because they were not offered a plea agreement." *Ibid.* Since aliens in the latter category "had no opportunity to alter their course in the criminal justice system in reliance on the availability of § 212(c) relief," the court "highly doubt[ed]" that aliens who were not offered a plea agreement "have a reliance interest that renders IIRIRA's repeal of former § 212(c) impermissibly retroactive as to them." *Ibid.* The Third Circuit ultimately held that "aliens * * * who affirmatively turned down a plea agreement had a reliance interest in the potential availability of § 212(c) relief." *Ibid.*

Petitioner was convicted of an aggravated felony after trial, but he does not contend that he declined a plea agreement before proceeding to trial. He therefore would not be able to prevail even under the Third Circuit's decision in *Ponnapula*.

ii. The decision below also does not conflict with the Fourth Circuit's decision in *Olatunji*, which did not even address the question whether the 1996 amendments to the INA concerning former Section 212(c) apply to aliens found guilty at trial before 1996. *Olatunji* involved a different provision of IIRIRA, codified at 8 U.S.C. 1101(a)(13)(C)(v), which provides that a lawful permanent resident who travels outside the United States will not be regarded as seeking admission upon his return unless he has been convicted of certain crimes. See *Olatunji*, 387 F.3d at 386. The question presented in this case was addressed by the Fourth Circuit in another case, *Chambers*, *supra*, which held, consistent with the decision below, that the 1996 amendments concerning former Section 212(c) apply to an otherwise-eligible alien who was convicted after trial.

It is true that, in ruling for the alien in *Olatunji*, the Fourth Circuit reasoned that the fact that the provision of IIRIRA in question "attached new legal consequences to Olatunji's guilty plea is, alone, sufficient to sustain his claim," and that "no form of reliance is necessary." 387 F.3d at 389; see Pet. 13-14, 17. But *Olatunji* did not purport to overrule *Chambers*. Indeed, *Olatunji* explicitly distinguished *Chambers*, on the ground that the provision of IIRIRA at issue there (and here) "did not attach new consequences to [the alien's] 'relevant past conduct,' namely his decision to go to trial." 387 F.3d at 392 (quoting *Chambers*, 307 F.3d at 293). Even under the reasoning employed in *Olatunji*, therefore, the amendments to the INA limiting the availability of relief from removal are applicable to aliens, like petitioner, who were convicted of an aggravated felony after trial.

iii. Nor does the decision below conflict with the Tenth Circuit's decision in *Hem*. Like the court of appeals here, the Tenth Circuit in *Hem* addressed the question whether the 1996 amendments to the INA apply to aliens found guilty at trial before 1996, but, like the Third Circuit in *Ponnapula*, it did not hold that the amendments do not apply to *any* alien found guilty at trial. The Tenth Circuit concluded that, "just as foregoing or exercising a right to jury trial can demonstrate objectively reasonable reliance, those who proceed to trial but forgo their right to appeal have suffered impermissible retroactive effects" under the 1996 amendments to the INA. 458 F.3d at 1191. The Tenth Circuit reasoned that, "[w]hen a defendant, like Hem, proceeds to trial, is convicted, [and] chooses not to pursue an appeal" that "could result in the loss of § 212(c) relief" (because the defendant could be resentenced to a prison term that would make him ineligible for discretionary

relief), and when the defendant "subsequently loses the availability of § 212(c) relief following the Attorney General's decision to apply [the 1996 amendments to the INA] retroactively," the defendant's "right to appeal has been retroactively impaired." *Id.* at 1200. The Tenth Circuit thus held that "a defendant who proceeds to trial but foregoes his right to appeal when § 212(c) relief was potentially available has suffered retroactive effects under IIRIRA." *Id.* at 1187.

Petitioner was convicted of an aggravated felony after trial, but he makes no argument that would bring him within the distinct rationale of *Hem* and points to nothing in the record that indicates that he chose not to pursue an appeal. He therefore would not be able to prevail even under the Tenth Circuit's decision in *Hem*.

d. After the certiorari petition was filed in this case, the Third Circuit again addressed the retroactivity question presented here in *Atkinson* v. *Attorney General*, 479 F.3d 222 (2007). It concluded that "the relevant question is whether IIRIRA attached new legal consequences to th[e] aliens' convictions," *id.* at 231, and that, with respect to aliens who "had not been offered pleas and who had been convicted of aggravated felonies following a jury trial at a time when that conviction would not have rendered them ineligible for section 212(c) relief," applying IIRIRA "to eliminate the availability of discretionary relief under former section 212(c) attach[es] new legal consequences to events completed before the repeal," *id.* at 229-230. The Third Circuit therefore held that an alien convicted before the 1996 amendments to the INA, and otherwise eligible to seek relief under Section 212(c), cannot be precluded from seeking such relief whether the alien was convicted by guilty plea or after trial. *Id.* at 229-231. The court

characterized as dictum—and declined to follow—its statement in *Ponnapula* that aliens convicted at trial before the 1996 amendments are probably not eligible for Section 212(c) relief if they were not offered a plea agreement. *Id.* at 231.

i. The Third Circuit's analysis in *Atkinson* is inconsistent with retroactivity principles applied in *St. Cyr*. The Third Circuit specifically declined to regard the relevant past event for retroactivity purposes to be the alien's underlying criminal conduct. See 479 F.3d at 231 n.8. And with good reason. In *St. Cyr* itself, the Second Circuit had rejected the proposition that the 1996 amendments repealing Section 212(c) could not be applied to an alien whose criminal conduct occurred before the amendments. The court concluded that "[i]t would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2d Cir. 2000) (citation omitted), aff'd, 533 U.S. 289 (2001). This Court in *St. Cyr* did not disagree with the Second Circuit on that point, and it likewise did not adopt the sweeping rule the Second Circuit had rejected. As explained above, see p. 5, *supra*, this Court instead focused on the alien's conduct at the time of conviction, when he voluntarily entered a guilty plea, thereby changing position as part of a *quid pro quo* arrangement. It was that *conduct by the alien*, not the mere fact of conviction, at a time when he would have been eligible for Section 212(c) relief, that was the predicate for the Court's holding that the repeal

of Section 212(c) could not be applied to an alien who pleaded guilty.

Where, as in *Atkinson*, the alien did not plead guilty, but instead was convicted after a trial, there was no such change of position or other past conduct by the alien at the time of conviction that would trigger non-retroactivity principles based on considerations of reasonable reliance and fair notice. The Third Circuit in *Atkinson* instead rested its ruling on the mere fact of conviction, divorced from any voluntary conduct or transaction by the alien. Nothing in *St. Cyr*, or in non-retroactivity principles more generally, supports that result. See *Fernandez-Vargas*, 126 S. Ct. at 2431-2432.

ii. Unlike the decisions on which petitioner relies, *Atkinson* does appear to conflict with the decision below (and with the decisions from other courts of appeals that agree with the decision below). There is no need for this Court to resolve the conflict, however, because the retroactivity question has little prospective significance: it affects only aliens who (1) were convicted of an aggravated felony before the 1996 amendments to the INA; (2) were convicted after a trial; and then (3) served less than five years in prison (unless they were convicted before 1990). That is a small and ever-diminishing class. The vast majority of criminal aliens against whom removal proceedings are commenced at present—and against whom such proceedings will be commenced in the future—were convicted after the 1996 amendments to the INA; the vast majority of the small number convicted before the 1996 amendments were convicted by guilty plea; and many of those who were convicted before the 1996 amendments and after a trial served at least five years in prison, a circumstance that would make them ineligible for Section 212(c) relief under the

pre-AEDPA (*i.e.*, 1990) version of Section 212(c). See *Ponnapula*, 373 F.3d at 496 n.16 ("[T]he effect of our overall holding is likely to be small. First, the class of aliens affected by this ruling is constantly shrinking in size as the effective date of IIRIRA recedes into the past. Second, * * * many aliens who are within the scope of this holding will nonetheless be statutorily ineligible for § 212(c) relief by reason of having served five years or more in prison. Third, many times more criminal defendants enter into plea agreements than go to trial.").

In any event, it would be premature for the Court to decide whether *St. Cyr*'s holding applies to aliens convicted of an aggravated felony after trial. A final rule adopted by the Department of Justice to implement *St. Cyr* by amending certain provisions of Title 8 of the Code of Federal Regulations, see *Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004), provides that the 1996 amendments to the INA apply to aliens convicted after trial. In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for section 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the amended regulations, which took effect on October 28, 2004. See *id.* at 57,833 (8 C.F.R. 1003.44(a)) ("This section is not applicable with respect to any conviction entered after trial."); *id.* at 57,835 (8 C.F.R. 1212.3(h)) ("Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with

respect to convictions entered after trial."). Only a few courts have considered these regulations in deciding whether *St. Cyr*'s holding applies to aliens convicted at trial, see, *e.g.*, *Alexandre* v. *United States Att'y Gen.*, 452 F.3d 1204, 1207 (11th Cir. 2006) (per curiam), and this Court should not be one of the first to do so.

2. Petitioner also contends (Pet. 21-25, 27-30) that the denial of a hearing on his application for discretionary relief under Section 212(c) violated due process. The court of appeals correctly held otherwise, and further review is unwarranted.

As the Third Circuit has explained, "discretionary relief is necessarily a matter of grace rather than of right," and thus "aliens do not have a due process liberty interest in consideration for such relief." *United States* v. *Torres*, 383 F.3d 92, 104 (2004). At least seven courts of appeals have reached the same conclusion, including the Fifth Circuit, which so held in *United States* v. *Lopez-Ortiz*, 313 F.3d 225 (2002), cert. denied, 537 U.S. 1135 (2003), the decision on which it relied here (Pet. App. 2a); accord *United States* v. *Wilson*, 316 F.3d 506, 510 (4th Cir.), cert. denied, 538 U.S. 1025 (2003); *Ali* v. *Ashcroft*, 366 F.3d 407, 412 (6th Cir. 2004); *Dave* v. *Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004); *Jamieson* v. *Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005); *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc); *Oguejiofor* v. *Attorney Gen.*, 277 F.3d 1305, 1309 (11th Cir. 2002) (per curiam). Petitioner contends (Pet. 21-25) that those decisions conflict with *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004), and *United States* v. *Copeland*, 376 F.3d 61 (2d Cir. 2004). If there is such a conflict, however, it is not implicated here.

Petitioner does not (and could not) contend that he has a freestanding due process right to have the IJ consider a request for discretionary relief from removal independent of the right created by Section 212(c) of the INA. He contends that he has a statutory right—under Section 212(c) and *St. Cyr*—and that the statutory right creates a liberty or property interest protected by the Due Process Clause. See, *e.g.*, Pet. 28 (arguing that "the threshold inquiry is whether [petitioner] has a 'life, liberty, or property' interest sufficient to invoke due process protections" and that, "at the moment of his conviction, [petitioner] gained a protected interest in the right to seek § 212(c) relief") (emphasis omitted); see also Pet. C.A. Br. 33 (arguing that it was "[t]he impermissible retroactive application" of the 1996 amendments to the INA that violated due process). The question whether petitioner has a constitutionally protected interest in a hearing on his application for discretionary relief, however, has no relevance in this case. If petitioner has a statutory right to seek Section 212(c) relief, he is entitled to a hearing on that application under governing procedures regardless of whether the right to a hearing can also be characterized as constitutional; and if he has no statutory right to seek Section 212(c) relief, there is no liberty or property interest that could be protected by the Due Process Clause.

In the cases on which petitioner relies, unlike in this one, there was no dispute that the alien had a statutory right to apply for relief under Section 212(c), because the alien was convicted by guilty plea before the 1996 amendments to the INA. See *Copeland*, 376 F.3d at 63; *Ubaldo-Figueroa*, 364 F.3d at 1046. The question whether the statutory right created an interest protected by the Due Process Clause was relevant in those

cases because they were illegal-reentry prosecutions in which the alien collaterally challenged the removal order on the ground that he had been deprived of his right to seek Section 212(c) relief, and a collateral challenge is permitted only if, among other things, the entry of the order was "fundamentally unfair," 8 U.S.C. 1326(d)(3), a term that has been interpreted to mean that the alien's "due process rights were violated by defects in his underlying deportation proceeding" (and that he suffered prejudice as a result), *Ubaldo-Figueroa*, 364 F.3d at 1048 (quoting *United States* v. *Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir.), cert. denied, 525 U.S. 849 (1998)). Because this case is on direct review, petitioner need only demonstrate a statutory entitlement to a hearing on his application for discretionary relief; he need not demonstrate a constitutional entitlement as well. For that reason, the due process question raised in the petition is an academic one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

ANTONIO RODRIGUEZ-ZAPATA,

Petitioner,

v.

ALBERTO R. GONZALES,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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8 U.S.C. § 1182(c) ("§ 212(c)") ..... *passim*

8 C.F.R. § 1212.3 ..... 8, 9

Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") 110 Stat. 3009 (1996), § 304(b) ..... *passim*

Section 212(c), Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57,826 (2004) 8

The Government's brief sidesteps the substantial circuit split over the role of reliance in retroactivity analysis. Instead, it asks whether Rodriguez-Zapata would prevail under the circuits' various standards for deciding whether aliens convicted prior to IIRIRA remain eligible for § 212(c) relief. It is the split regarding reliance, however, that led the circuits to adopt this jumble of conflicting standards and "carve-outs" for § 212(c) eligibility. This Court's review is needed to resolve the split and ensure uniformity.

Moreover, the recent decision in *Atkinson* v. *Attorney General*, 479 F.3d 222, 230-31 (3d Cir. 2007), confirms that Rodriguez-Zapata would prevail under the Third Circuit standard. *Atkinson* deepened the circuit split over the retroactive application of IIRIRA § 304(b), holding that aliens convicted of an aggravated felony by a jury prior to IIRIRA remain eligible to seek § 212(c) relief even without showing reliance on prior law. The Government concedes (at 13) that *Atkinson* is in direct conflict with the Fifth Circuit's decision in this case. Though the Government attacks the reasoning of *Atkinson*, its merits-based arguments do not lessen the need for this Court to resolve the split. In any event, *Atkinson* is consistent with this Court's retroactivity precedent.

The Government also contends that Rodriguez-Zapata's due process claim is "academic." Yet it fails to recognize that Rodriguez-Zapata's statutory right to seek § 212(c) relief vested well before the passage of IIRIRA. The circuits are split regarding whether a vested right to seek discretionary relief is subject to due process protection, and this Court's review is needed to resolve that important issue.

A. The circuits are deeply divided over the role of reliance in retroactivity analysis.

In an effort to explain away the circuit split on reliance, the Government spends much of its brief analyzing whether Rodriguez-Zapata would prevail under the various standards that the circuits use to determine whether an alien can seek relief under former § 212(c). Yet this approach only serves to

highlight that Rodriguez-Zapata would prevail under the Third Circuit's recent decision in *Atkinson*, which the Government concedes is in direct conflict with the Fifth Circuit's holding in this case. Opp. 13. In addition to the procedural and factual distinctions that make this case a better vehicle for decision than past petitions (see Pet. 15-16), *Atkinson* provides another compelling reason for the Court to grant certiorari now even though it has previously denied petitions raising similar questions.

Moreover, the Government's response sidesteps the important circuit split over the role of reliance in retroactivity analysis, which has had pernicious effects both within and outside the immigration context. Pet. 14-16. It is this split over reliance that led the circuits to adopt conflicting standards and carve-outs for deciding which aliens remain eligible for § 212(c) relief. Pet. 10-14; Opp. 5-6, 8-11. Given the significant constitutional interest in uniform application of immigration laws (Pet. 3), the Court should grant this petition to resolve the conflict and clarify its retroactivity precedent.

Nine circuits have weighed in on this recurring reliance issue, creating a three-way circuit split that is ripe for this Court to address. *Olatunji*, 387 F.3d at 390 (noting "substantial confusion as to whether a party must prove some form of reliance in order to demonstrate that a statute is impermissibly retroactive"). The lower courts recognize that this issue is an important one worthy of this Court's review. *Hem*, 458 F.3d at 1191 (split concerns "essential" issue of "whether reliance must be established objectively, subjectively, or even at all" in analyzing retroactivity of IIRIRA § 304(b)).

Six circuits, including the Fifth, have held that an alien must show "actual" or "subjective" reliance on prior law to avoid retroactive application of IIRIRA § 304(b). In most of these circuits, only aliens who pled guilty to an aggravated felony meet this test. Pet. 11-12; Opp. 5-6, 8. The Fifth Circuit recently reaffirmed its standard in *Carranza-de Salinas* v. *Gonzales*, 477 F.3d 200, 205 (5th Cir. 2007), stating that

"[a]fter *Hernandez-Castillo*, this circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate *actual, subjective reliance* on the pre-IIRIRA state of the law to be eligible for relief from its retroactive application." (emphasis added).[1]

By contrast, the Third, Fourth, and Tenth Circuits have adopted different retroactivity standards that carve out additional classes of aliens who remain eligible for relief. See *Atkinson*, 479 F.3d at 229 (3d Cir.) (reliance is only a "factor" in retroactivity analysis); *Hem*, 458 F.3d. at 1199-1200 (10th Cir.) (holding that alien must only show "reasonable reliance" on prior law to avoid retroactive application of IIRIRA § 304(b)); *Olatunji*, 387 F.3d at 388-89 (4th Cir.) (holding that no showing of reliance is required to establish impermissible retroactivity). Rodriguez-Zapata's case would have been analyzed far differently and would have reached a different outcome under the retroactivity standards of these circuits.

In *Atkinson*, the Third Circuit held that aliens like Rodriguez-Zapata, who were convicted of an aggravated felony by a jury prior to IIRIRA, remain eligible to seek § 212(c) relief. 479 F.3d at 231. The court reasoned:

> IIRIRA has plainly attached new legal consequences to [the petitioner's] conviction. See *Olatunji*, 387 F.3d at 396. Prior to IIRIRA's enactment, [the petitioner] remained free to apply for a waiver under section 212(c) despite his conviction of an aggravated felony. After IIRIRA, he lost that right; applying basic principles of retroactivity, IIRIRA attached a new

[1] Demonstrating the difficulty of applying this subjective reliance standard uniformly, *Carranza-de Salinas* held that aliens who deferred applying for § 212(c) relief "in order to establish a stronger record of rehabilitation" may also remain eligible for relief. 477 F.3d at 202. Only the Second Circuit has adopted a similar carve-out. *Restrepo* v. *McElroy*, 369 F.3d 627, 633-39 (2d Cir. 2004).

> legal consequence to [the petitioner's] conviction: the certainty—rather than the possibility—of deportation. Such a change in legal consequences based on events completed before IIRIRA's enactment constitutes an impermissible retroactive effect.

Id. at 230. *Atkinson* removed any confusion created by *Ponnapula*'s "reasonable reliance" standard, which had carved out aliens who turned down plea agreements. 373 F.3d at 483. Instead, *Atkinson* squarely held that aliens like Rodriguez-Zapata remain eligible for § 212(c) relief regardless of whether they relied on prior law. 479 F.3d at 230.

Rodriguez-Zapata would also prevail under the Tenth Circuit's "reasonable reliance" standard. In *Hem*, the Tenth Circuit carved out a class of aliens who were convicted by juries and chose to forgo appeals of their convictions, holding that they remained eligible for § 212(c) relief because they may have "reasonably been motivated by [its] availability." 458 F.3d at 1199. Rodriguez-Zapata falls squarely within this class of aliens and thus need not show individual reliance on prior law. See *id.* at 1196 (rejecting "subjective/actual reliance" standard). The record does not indicate that he pursued an appeal of his conviction, and an independent search of public records likewise revealed no appeal. In any event, because he was never allowed to establish a record on his retroactivity claim before the BIA, Rodriguez-Zapata should be given an opportunity on remand to present evidence that he chose to forgo an appeal or otherwise relied on the continued availability of § 212(c) relief. *Carranza-de Salinas*, 477 F.3d at 209-210; *Restrepo*, 369 F.3d at 632-33 & n.10.

Finally, Rodriguez-Zapata would prevail under the Fourth Circuit's retroactivity standard. In *Olatunji*, the Fourth Circuit held unequivocally that "reliance (whether subjective or objective) is not a requirement of impermissible retroactivity." 387 F.3d at 388-89. It is true that *Olatunji* involved a different provision of IIRIRA than the one at issue in this case. The Fifth Circuit's decision here, however, hinged on

Rodriguez-Zapata's purported lack of reliance on prior law. Pet. App. 2a. Thus, under *Olatunji*'s "no reliance" standard, his case undoubtedly would have been analyzed differently and likely would have reached a different result.[2]

This circuit split over the role of reliance is significant and has become even more entrenched. The Court should take this opportunity to resolve the split and clarify its retroactivity precedent.

B. The decision below conflicts with this Court's retroactivity precedent.

The Government also misinterprets this Court's retroactivity precedent, which demonstrates that reliance is only a *factor* in retroactivity analysis, not a requirement. *Atkinson*, 479 F.3d at 229. The Fifth Circuit erred by imposing a subjective reliance requirement in this case.

The Government focuses almost exclusively on *St. Cyr* and does not even attempt to address this Court's other retroactivity precedents. It is true that the Court in *St. Cyr* looked to the *quid pro quo* nature of plea agreements because that was the factual situation before it. Yet *St. Cyr* did not purport to hold that a showing of reliance on prior law is *necessary* to avoid retroactive application of a statute. Rather, the Court merely concluded that the *quid pro quo* nature of plea agreements was *sufficient* to show that applying IIRIRA § 304(b) retroactively would "attach[] a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321.

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[2] As the Government notes, the Fourth Circuit previously held in *Chambers* that IIRIRA § 304(b) is not impermissibly retroactive with respect to aliens convicted by a jury prior to its passage because they lack sufficient "reliance interests"—a factor it later found irrelevant in *Olatunji*. See *Chambers*, 307 F.3d at 290. The tension between *Olatunji* and *Chambers* only serves to highlight the confusion in the lower courts over the role of reliance in retroactivity analysis.

This Court's pre-*St. Cyr* precedent confirms that reliance is merely one factor in retroactivity analysis. See Pet. 18-20; MALDEF *Amicus* Br. After a thorough review of this Court's precedent, the Third Circuit reached the same conclusion in *Atkinson*: "The [Supreme] Court has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." 479 F.3d at 227-28. In other words, "[i]mpermissible retroactivity, as defined in *Landgraf*, does not require that those affected by the change in law have relied on the prior state of the law." *Id.* at 229. Accordingly, the Third Circuit held that aliens convicted of an aggravated felony by a jury before IIRIRA remain eligible for § 212(c) relief. *Id.* at 230-31.

Contrary to the Government's assertions, *Atkinson* is fully consistent with this Court's retroactivity precedent. The *Atkinson* court correctly chose the conviction itself as the "relevant past event" for retroactivity analysis. *Ibid.* ("We emphasize that the important "event" to which IIRIRA attached a new legal consequence was the conviction."). As this Court recognized in *St. Cyr*, it is the conviction that triggers immigration consequences. 533 U.S. at 314-15 (noting that alien became both subject to deportation and eligible for § 212(c) relief at the time of guilty plea), *aff'g St. Cyr* v. *INS*, 229 F.3d 406, 418 (2d Cir. 2000) ("conviction * * * triggers the disqualification from § 212(c) relief"); see also *Thom* v. *Ashcroft*, 369 F.3d 158, 170 (Underhill, J., dissenting). After all, "absent a legal determination of guilt, the alien is not subject to deportation or in need of section 212(c) relief." *Atkinson*, 479 F.3d at 231 n.8; see also Pet. 26-27. The Government suggests (at 13) that this analysis is inconsistent with *Fernandez-Vargas*, but *Atkinson* explains that the situation of aliens like Rodriguez-Zapata is distinguishable because their convictions occurred in the past and cannot be changed. 479 F.3d at 230-31.

By imposing a "subjective reliance" requirement, the Fifth Circuit contravened this Court's precedent, which has consis-

tently considered reliance as merely one factor in retroactivity analysis. Accordingly, this Court should grant certiorari and reverse.

C. The Court should take this opportunity to resolve the split regarding reliance.

The Government offers no persuasive reason why this Court should wait any longer to resolve this important circuit split over the role of reliance in analyzing the retroactivity of IIRIRA § 304(b). The Government first asserts that the Court need not resolve the conflict because it affects only a "small and ever-diminishing class." Opp. 13. To the contrary, *St. Cyr* concluded that the number of aliens whose ability to remain in the United States depends on eligibility for § 212(c) relief is "extremely large." 533 U.S. at 296. Moreover, as the Government itself notes (at 4-5), this Court has received several petitions in the last few months that concern whether aliens convicted by a jury prior to IIRIRA remain eligible for § 212(c) relief. The 2007 decisions in *Atkinson* and *Carranza-de Salinas* further confirm that this issue is very much alive ten years after the passage of IIRIRA. In any event, this Court has granted certiorari in other cases involving far less numerous classes where, as here, important liberty interests are at stake. *E.g.*, *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1674 (2007) (discussing line of cases that address small subset of Texas capital prisoners tried prior to 1991 who have mitigating evidence that could not be given effect under their jury instructions); see also *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945) ("That deportation is a penalty—at times a most serious one—cannot be doubted."); Pet. 28.

The regulations cited by the Government also present no impediment to this Court's review. As an initial matter, the Government did not raise the regulations below, and this Court rarely considers new arguments supporting the judgment. *E.g.*, *United States* v. *Estate of Romani*, 523 U.S. 517, 526 n.11 (1998). Moreover, these regulations do not alter the retroactivity analysis.

Both 8 C.F.R. § 1003.44 and 8 C.F.R. § 1212.3(h) were adopted by the Department of Justice in response to the *St. Cyr* decision. See *Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). It is true that both regulations draw a distinction between aliens convicted after trial and those who pled guilty. See 8 C.F.R. § 1003.44(a); 8 C.F.R. § 1212.3(h). As the Department of Justice noted in its comments, however, this distinction was based on the decisions of the lower courts at that time. 69 Fed. Reg. at 57,828. The issue has been litigated heavily in the lower courts since 2004 and, as explained above, the courts have now come to varying conclusions.

Rule 1003.44 provided a mechanism for aliens covered by *St. Cyr* to file a "special motion" to reopen their removal proceedings. 8 C.F.R. § 1003.44(a). The deadline for such motions was April 26, 2005. See 8 C.F.R. § 1003.44(h). Because this deadline has now passed, the regulation has little relevance to the analysis here or in future cases.

Rule 1212.3 does appear to apply to current and future removal proceedings. Yet the distinction it draws between aliens convicted after a jury trial and those who pleaded guilty is subject to the same retroactivity challenges discussed in Parts A and B above. This Court and others have consistently applied the same retroactivity principles to both statutes and regulations. *E.g.*, *Regions Hospital* v. *Shalala*, 522 U.S. 448, 456 (1998) (applying *Landgraf* analysis to Medicare regulations); *Sweet* v. *Sheahan*, 235 F.3d 80, 89 (2d Cir. 2000) (applying *Landgraf* to proposed environmental regulations). Thus, the Court need not await further challenges to Rule 1212.3 before it can resolve the retroactivity issues presented by this case.[3]

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[3] Notably, the Fifth Circuit in *Carranza-de Salinas* acknowledged these rules but did not find them relevant to its retroactivity analysis. 477 F.3d at 207.

D. The circuit split over due process protection for the right to seek § 212(c) relief is genuine and should be resolved.

Contrary to the Government's assertions, Rodriguez-Zapata's due process claim is not merely "academic." Opp. 17. Six circuits, including the Fifth Circuit, have held that aliens have no due process interest in the right to seek § 212(c) relief. Pet. 21-22. Two circuits, however, have held that the right to seek § 212(c) relief, though discretionary, is subject to due process protections. See *Copeland*, 376 F.3d at 72; *Ubaldo-Figueroa*, 364 F.3d at 1048. The Court should take the opportunity to resolve the circuit split on this significant constitutional issue.

The Government contends that *Copeland* and *Ubaldo-Figueroa* are inapposite because, in those cases, "there was no dispute that the alien had a statutory right to apply for relief under Section 212(c)." Opp. 16. Yet here, there can likewise be no dispute that Rodriguez-Zapata had a statutory right to seek § 212(c) relief. Rodriguez-Zapata became statutorily eligible for § 212(c) relief well before the passage of IIRIRA.

Under former § 212(c), an alien was eligible to seek discretionary relief from removal if the alien was: (1) a lawful permanent resident, (2) with "unrelinquished domicile of seven consecutive years," and (3) had not served five years or more in prison for an aggravated felony. See 8 U.S.C. § 1182(c) (1994). The regulations allowed an alien to apply for relief at *any* time after entering the country, even before the commencement of removal proceedings. 8 C.F.R. § 1212.3(b) (formerly 8 C.F.R. 212.3(b)) ("The application may be filed prior to, at the time of, or at any time after the applicant's departure from or arrival into the United States."); see *Carranza-de Salinas*, 477 F.3d at 207-08. Rodriguez-Zapata fulfilled these statutory criteria before IIRIRA became law. Pet. 6-7. Thus, Rodriguez-Zapata's statutory right

to § 212(c) relief had already vested well before it was eliminated by IIRIRA § 304(b).

Both the Second and Ninth Circuits have correctly recognized that this vested statutory right to seek § 212(c) relief is subject to due process protections. Even the Government concedes that "[i]f petitioner has a statutory right to seek Section 212(c) relief, he is entitled to a hearing on that application." Opp. 16. Because Rodriguez-Zapata was given no hearing, reversal is required.

This Court has previously recognized a due process interest in the right to seek discretionary relief. In *Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-68 (1954), the Court held that removing the BIA's discretion over whether to grant suspension from deportation and replacing it with a mandate from the Attorney General violated due process. Even though the grant of relief itself was discretionary, the Court concluded that the alien was entitled to a hearing on his application, the "due process required by the regulations in such proceedings." *Id.* at 268; see also Immigration Clinic *Amicus* Br. 13-17. Likewise, once Rodriguez-Zapata's statutory right to § 212(c) vested (*i.e.*, when he met all of the statutory criteria to apply for relief), he became entitled to a hearing on the merits of his claim. The retroactive application of IIRIRA § 304(b) deprived Rodriguez-Zapata of this right in violation of due process.

CONCLUSION

For these additional reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

ANTONIO RODRIGUEZ-ZAPATA,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE IMMIGRATION CLINIC AT THE UNIVERSITY OF HOUSTON LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Immigration Clinic at the University of Houston Law Center (the "Clinic") submits this *amicus curiae* brief in support of Antonio Rodriguez-Zapata's petition for writ of certiorari.[1] Petitioner seeks review of the United States Court of Appeals for the Fifth Circuit's decision that an immigration judge ("IJ") and the Board of Immigration Appeals ("BIA") were statutorily required to deny his request for discretionary relief from removal from the United States without a hearing (a "§212(c) hearing"). The court also concluded that denying a §212(c) hearing did not violate Petitioner's due process rights. The Clinic shares Petitioner's position that the Fifth Circuit's view of the constitutional rights of Lawful Permanent Residents ("LPRs") of the United States is incorrect, and that it was unconstitutional to apply the 1996 repeal of §212(c) of the Immigration and Naturalization Act ("INA") retroactively to Petitioner.

The Clinic and the immigrants it represents have a significant interest in the issues the Petitioner asks the Court to address. The Clinic has been part of the University of Houston Law Center's clinical program since 1999. The lawyers who staff the Clinic handle applications for asylum on behalf of victims of torture and persecution, and represent immigrants who have been the victims of domestic violence. The Clinic represents clients in a variety of immigration proceedings, including: representation in removal proceedings; asylum applications; family visa processing; citizenship; juvenile matters; relief under the Violence Against Women Act; and review of Department of

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[1]This brief is submitted with the consent of the parties pursuant to U.S. Supreme Court Rule 37(2). Pursuant to Rule 37.6, the Clinic affirms no party or their counsel authored or paid for this brief, in whole or in part.

Homeland Security ("DHS") decisions and the Executive Office for Immigration Review, including §212(c) hearings.

Joseph A. Vail, Associate Clinical Professor, was an immigration judge from 1995 to 1999. He practiced throughout the 1980s and 1990s, when §212(c) was a common defense to exclusion and deportation charges, and he handled many §212(c) cases on behalf of resident aliens. The Clinic's other lawyers devote a substantial portion of their time to assisting immigrants held by Immigration and Customs Enforcement ("ICE") pending removal. Section 212(c) is often a viable remedy for these immigrants.

The Clinic advocates for application of the immigration laws in a manner that is fair, uniform, and mindful of immigrants' rights, including in particular, the constitutional rights of Lawful Permanent Residents of the United States.

BACKGROUND

A. The Statutory Changes To The Immigration Laws

Prior to 1996, INA §212(c) (8 U.S.C. §1182(c) (1994)) provided a critically important defense to deportation for LPRs facing removal from the country.[2] Though often resulting from a crime or conviction, any statutorily-defined ground for inadmissibility could trigger removal proceedings. Under §212(c), a LPR convicted of a crime could ask the Attorney General to waive deportability if: (a) the LPR had served less than five years in prison for that crime (applicable for aggravated felons only); and (b) the LPR had maintained "an unrelinquished domicile of seven consecutive years" in the United States. 8 U.S.C. §1182(c)

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[2] The terms "deportation" and "removal" are used interchangeably in this *amicus* brief.

(1994). Additionally, a LPR could *affirmatively* apply for §212(c) relief – an important consideration for (among others) a LPR intending to travel outside the United States.

The Attorney General delegated his role in this regard to IJs (for pending proceedings) and District Directors (for non-pending proceedings), with BIA review. *Jay v. Boyd*, 351 U.S. 345, 352 n.8 (1956). Section 212(c) hearings allowed an IJ or District Director to decide, on the individualized facts, whether social and humane considerations outweighed the alien's undesirability as a permanent resident.

Since at least 1978, the BIA has had standards by which it (and an IJ in the first instance) evaluates requests for §212(c) relief. The IJ must consider negative and positive factors: (1) the seriousness of the offense; (2) immigration and criminal histories; (3) the presence of "other evidence" indicating the LPR's bad character or undesirability; (4) any evidence of rehabilitation (or recidivism); (5) how long the LPR has resided in the U.S.; (6) the LPR's family ties in the U.S.; (7) the extent of the hardship to the LPR and his family that would result from deportation; (8) the LPR's employment history; and (9) the character of any service in the Armed Forces. *In re Marin,* 16 I. & N. Dec. 581, 584-85 (BIA 1978). As a crime's seriousness increases, the equities must be outstanding; if the equities are outstanding, then rehabilitation usually becomes a crucial factor in the final balancing of the positive and negative factors. *In re Edwards*, 20 I. & N. Dec. 191, 196 (BIA 1990).

"[T]he class of aliens whose continued residence in this country has depended on their eligibility for §212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for §212(c) relief have been granted." *I.N.S. v. St. Cyr*, 533 U.S. 289, 295 (2001) (noting more than 10,000 aliens were granted §212(c) relief between 1989 and 1995). Indeed, IJs *regularly* granted §212(c) relief.

Between 1989 and 1995, more than one-half of all §212(c) petitions were granted. *Id.* at 296 n.5; 142 CONG. REC. S12,294-01, S12,295 (daily ed. Oct. 3, 1996) (Statement of Sen. Abraham). In the Clinic's experience, an IJ usually granted §212(c) relief when a LPR defending removal based on a crime showed outstanding equities, rehabilitation, and remorse. This is especially so when the resident had long periods of time without subsequent offenses.

The passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), (collectively, the "1996 Amendments") sharply curtailed the population of LPRs convicted of a crime who potentially could avoid removal. Specifically, in §440(d) of the AEDPA (effective April 24, 1996), Congress amended 8 U.S.C. §1182(c) to bar §212(c) relief for (among others) any LPR who had been convicted of an "aggravated felony" in the United States – regardless of whether the LPR had been sentenced to or had served any time in prison for that offense. Pub. L. 104-132, 110 Stat. 1214, 1277 (1996). Congress then passed IIRIRA, §304(b) of which repealed §212(c) altogether and replaced it with a procedure called "cancellation of removal." Pub. L. No. 104-208, 110 Stat. 3009-587 (1996). IIRIRA took effect on April 1, 1997. Cancellation of removal also is not available to any LPR convicted of an aggravated felony while in the United States.

Moreover, over the last two decades, Congress also has expanded markedly the types of crimes considered "aggravated felonies" for purposes of INA §212(c) and IIRIRA §304(b). "Aggravated felony" first appeared in the immigration law context in the Anti-Drug Abuse Act of 1988, which simply created a separate ground for deportation for serious crimes like murder, any drug trafficking crime, or any illicit trafficking in any firearms or destructive devices. Pub. L. 100-690, 102 Stat. 4181 (1988). In 1990, Congress

passed the Immigration Act, which limited discretionary relief for §212(c) waivers, suspensions of deportation, voluntary departures, asylum, and withholding of deportation for aliens who had been convicted of an "aggravated felony." Pub. L. 101-649, 104 Stat. 4978 (1990). The Immigration Act also expanded "aggravated felony" to include money laundering and "*any crime of violence* . . . for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years." *Id.* (emph. added). In 1994, Congress again expanded the definition to include non-violent crimes such as fraud, burglary, and theft. Immigration and Nationality Technical Correction Act of 1994, Pub. L. No. 103-416, 105 Stat. 1733 (1994).

In 1996, Congress dramatically expanded "aggravated felony" to include dozens more offenses, including misdemeanor and low-level felony offenses. 8 U.S.C. §1101(a). Concurrently, Congress lowered the imprisonment threshold for many crimes from five years to one. *E.g.*, 8 U.C.S. §1101(a)(43). Moreover, Congress made clear the new, broader statutory definition of "aggravated felony" applies retroactively. *Aragon-Ayon v. I.N.S.*, 206 F.3d 847 (9th Cir. 2000); *see also Garrido-Morato v. Gonzales*, No. 05-60555, 2007 U.S. App. LEXIS 9372 (5th Cir. Apr. 24, 2007).

B. These Statutory Changes Trap Petitioner

Petitioner was admitted as a LPR on or about May 5, 1981. He since has established deep family ties in the United States, where he has a wife and four children (three of whom were born in the United States). Petitioner's father and four siblings all live in the United States as well.

Fourteen years after he was admitted, in October 1995, a jury convicted Petitioner of indecency with a child, in violation of the Texas Penal Code. The Penal Code provided

for up to twenty years in prison. But, on the jury's recommendation, the court sentenced Petitioner to only ten years probation (no jail time) and fined him $2,000.

Petitioner's conviction rendered him removable. However, he also would have been eligible for §212(c) relief. Indeed, in the Clinic's experience, Petitioner would have readily qualified for §212(c) relief because he has not been convicted of any subsequent offense, he has strong family ties, and he has a long residence in the United States. However, because the Attorney General did not promptly seek to remove Petitioner, he had no reason to petition for such relief at any time before the 1996 statutory changes.

Nearly six years later, on June 27, 2001, the Immigration and Naturalization Service ("INS") issued a Notice to Appear to Petitioner, citing his 1995 conviction as an "aggravated felony" that rendered him removable. Petitioner conceded removability and requested §212(c) relief. The IJ concluded that, in view of the 1996 repeal of §212(c), he had "no option" but to deny Petitioner's request for relief. The BIA affirmed without opinion; and the Fifth Circuit affirmed in an unpublished opinion, citing its holdings in *Hernandez-Castillo v. Moore,* 436 F.3d 516 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 40 (2006), and *United States v. Lopez-Ortiz*, 313 F.3d 225 (5th Cir. 2002), as controlling authority.

SUMMARY OF ARGUMENT

The Fifth Circuit's selectively retroactive elimination of §212(c) hearings for certain LPRs violates the constitutional guarantee of due process. It, of course, "does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively." Rather, the retroactive aspects of legislation must satisfy due process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976). Eliminating §212(c) hearings

for LPRs convicted of crimes prior to the 1996 Amendments' effective dates does not satisfy due process.

The Fifth Circuit also is improperly discriminating in an arbitrary and capricious manner among LPRs convicted by a jury and those convicted because of a plea bargain. The court's approach materially penalizes—retroactively and without prior notice—LPRs who exercised their constitutional right to a jury trial.

Although this Court has denied other petitions for writ of certiorari that raised these or similar issues, as Petitioner correctly points out [Petition at 3], this case does not suffer from the procedural infirmities affecting those other petitions. To the contrary, the facts here squarely present the legal issues that divide the federal courts of appeals after *St. Cyr*: whether and to what extent the elimination of §212(c) hearings can constitutionally be retroactively applied. This Court should grant the Petition.

ARGUMENT

A. This Was A Retroactive Application Of A Statute

The Fifth Circuit held, first, that applying the 1996 Amendments to Petitioner "did not create an impermissible retroactive effect." That holding was incorrect. A statute is retroactive where (as here) it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994).

Applying the 1996 Amendments to Petitioner attached a "new disability" – automatic removal from the country – to past transactions and considerations, including: (1) his decision not to appeal a conviction resulting in a lenient

sentence; and (2) if he had been offered a plea bargain (the record does not reflect one way or the other), his decision to decline it and chance that a jury either would find him not guilty or recommend a sentence more lenient than what the prosecutor had offered. In short, the Fifth Circuit plainly applied the 1996 Amendments retroactively.

B. Where, As Here, Congress Does Not Mandate That A Statutory Provision Applies Retroactively, Courts Must Presume That It Applies Only To Post-Enactment Conduct

The principle that "the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *St. Cyr*, 533 U.S. at 316 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Because retroactive statutes "raise special concerns" (*id.* at 315), a statute usually may not be applied retroactively absent a clear indication Congress intended that result. "Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 316 (quoting *Landgraf*, 511 U.S. at 272-73).

Although Congress *did* expressly state that certain of the 1996 Amendments apply retroactively, Congress *did not* state that the 1996 amendment and subsequent repeal of INA §212(c) should apply retroactively. *Id.* at 320. Absent such a congressional directive, courts must presume the statutory elimination of §212(c) hearings operates prospectively only.

However, the Fifth Circuit (and the other courts of appeal differentiating between LPRs convicted as the result of a plea bargain and those convicted by a jury) actually employ the opposite presumption: they presume that the 1996 repeal

of §212(c) applies retroactively to eliminate §212(c) relief as a matter of law *unless* a LPR demonstrates otherwise. These courts, by requiring a LPR to prove he subjectively relied on the existence of §212(c) relief (in, for example, formulating his criminal defense strategy), reverse the required presumption and improperly convert a question of law (a statute's retroactivity) into a highly fact-specific inquiry.

C. It Violates Due Process To Apply The Repeal Of §212(c) Retroactively To A LPR Convicted Of A Crime Before The 1996 Amendments

In the *Landgraf* line of cases, this Court established a framework for evaluating when and whether private actions are protected from retroactive laws. Where (as here), Congress has not spoken, this Court considers: (1) the nature of the change in the law; (2) the extent of the change in the law; and (3) the degree of connection between the operation of the new rule and a relevant past event. Jan G. Laitos, *The New Retroactivity Causation Standard*, 51 ALA. L. REV. 1123, 1140 (Spring 2000). Here, the law has changed drastically in kind and scope, and the change has materially affected certain LPRs' past conduct and decisions, in that it eliminates their statutory right to seek relief from removal in an individualized setting, to which due process rights attach.

1. The Nature And Extent Of The Changes The 1996 Amendments Made To Immigration Law Were Profound, As They Eliminated The Only Available Avenue For Avoiding Removal From This Country

This Court has repeatedly stated that the greater the punitive effect of a change in law, the more skeptical it will be of arguments urging the retrospective application of the changed law. Here, although the outcome mandated by the 1996 Amendments (removal from the country) technically is

not "punitive," it "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty - at times a most serious one - cannot be doubted." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *see Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Over thirty years ago, this Court noted it would "hesitate to approve the retrospective imposition of liability on *any* theory of deterrence . . . or blameworthiness." *Usery*, 428 U.S. at 7 (emph. added).

Then, in *Landgraf*, 511 U.S. at 281, this Court applied *Usery*'s teachings. *Landgraf* held a then-new provision of Title VII authorizing punitive damages in a civil suit if the plaintiff established the defendant acted with malice or reckless indifference could not be applied retroactively. Although punitive damages (like forced removal) are not technically "criminal sanctions," they do "share key characteristics." *Id.* Moreover, the new Title VII provision authorizing plaintiffs to recover *compensatory* damages (whereas before, they were limited to a backpay remedy) *also* was the type of provision that, though not punitive, nonetheless "would attach an important new legal burden" on defendants' past conduct, and therefore also could not constitutionally be applied retroactively. *Id.* at 282-83. Critically, this Court noted (at 283-84):

> The extent of a party's liability, in the civil context, as well as the criminal, is an important legal consequence that cannot be ignored. . . . [We have never] read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment.

More recently, this Court also held it unconstitutional to apply economic legislation in a way that imposes substantial and disproportionate burdens on past conduct. *Eastern*

Enterprises v. Apfel, 524 U.S. 498 (1998). This Court's recent punitive damages jurisprudence reflects similar concerns about retrospectively imposing burdens on past conduct. Specifically, that disproportionate punitive damages awards violate due process reflects the Court's recognition (seen in *Usery*, *Landgraf* and *Eastern Enterprises*) that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996).

Petitioner's interest in having an opportunity to establish that social and humane factors outweigh his undesirability as a U.S. resident is at least as weighty as the economic burdens in *Landgraf*, *Usery*, *Eastern Enterprises*, and *BMW*. The very same "elementary notions of fairness enshrined in our constitutional jurisprudence" this Court cited in those cases to bar retroactive application of laws that increased liability for past conduct also apply in the immigration context. A deportation hearing "involves issues basic to human liberty and happiness." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). "Here the liberty of an individual is at stake." *Bridges*, 326 U.S. at 154. "[I]t must be remembered that although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling [and] may result in the loss 'of all that makes life worth living.'" *Id.* at 147 (citations omitted).

2. The Retroactive Reach Of The Elimination Of §212(c) Hearings Is Temporally Unbounded

The far-reaching effect of the 1996 repeal of §212(c) also counsels in favor of only applying that statutory change

prospectively. Where a statute's retroactive effect is "confined to a short and limited period," (e.g., "a time period required by the practicalities of producing national legislation"), that limited degree of retroactivity will not necessarily render it unconstitutional. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). Conversely, however, where a statute's retroactive effect would be temporally boundless, that fact compels its prospective application.

Here, eliminating §212(c) hearings reaches back to affect even those LPRs who committed a single indiscretion years ago. Under the Fifth Circuit's approach, hundreds of LPRs (like Petitioner) who have spent years as law-abiding, gainfully-employed U.S. residents are unfairly subject to the uncertainty of the long arm of the law reaching out to pluck them from what perhaps may be the only life they know.

3. The Fifth Circuit's Elimination Of A Right To A §212(c) Hearing Unconstitutionally Deprives Petitioner Of Liberty And Property Interests

Applying the 1996 Amendments retroactively to deprive Petitioner of a right even to *seek* §212(c) relief deprives him of liberty and property interests. Although a LPR does not possess the full panoply of rights as a U.S. citizen, a LPR *does* possess the rights to liberty and property. *Landon v. Plasencia*, 459 U.S. 21 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (the Fifth and Fourteenth Amendments protect aliens within the jurisdiction of the United States from deprivation of life, liberty or property without due process of law). And where, as here, protected liberty or property interests are implicated, "the right to some kind of prior hearing is paramount." *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972); *Perry v. Swindermann*, 408 U.S. 593, 603 (1972) (an applicant for continued employment "must be

given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution'").

By depriving Petitioner (and others in his situation) of the right to a hearing where he could demonstrate that social and humane considerations outweigh his "undesirability" as a U.S. resident, the Fifth Circuit improperly fails to recognize LPRs' constitutional liberty and property rights.

a. LPRs Have Liberty And Property Interests In The "Right To Try" To Avoid Removal

Petitioner has a legitimate claim of entitlement to a §212(c) hearing at which he might try to establish his eligibility for relief. He is not required, as a matter of constitutional law, to establish that he would received 212(c) relief if granted a 212(c) hearing. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). For example, although the welfare recipients in *Goldberg* had not yet shown they were "within the statutory terms of eligibility," this Court nonetheless held "they had a right to a hearing at which they might attempt to" make such a showing. *Roth*, 408 U.S. at 577.

To have a property interest in a benefit, an individual must have a "legitimate claim of entitlement" to that benefit. *Id.* The federal courts of appeal agree that individuals have liberty or property interests in the right to apply for a benefit if specific eligibility criteria limit the decisionmaker's discretion to grant or deny the benefit. For example, in *Winsett v. McGinnes*, 617 F.2d 996, 1007 (3d Cir. 1980), the court found comprehensive regulations governing a prison work-release program created an entitlement to which liberty rights attach. There, a prisoner sued for violation of his due process rights, claiming prison authorities denied his work-release applications on grounds not set forth in the

regulations. *Id.* at 1000-01. The statute and regulations envisioned the grant of work release when a prisoner met "certain eligibility criteria and the prison authorities, exercising their sound discretion, concur that work release is appropriate." *Id.* at 1006. Significantly, that the prison authorities had a measure of discretion in administering the work release program did not "negate the possibility that a state-created entitlement to work release may exist," primarily because their discretion was *not* absolute. *Id.* To the contrary, the regulations conferred discretion on prison officials to deny an application for work release "only within established parameters." *Id.* at 1007. In other words, although the authorities had discretion, "that discretion must be exercised consistently with the purpose and policy behind work release." *Id.* Other cases are in accord:

- *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982) ("Congress and the executive have created, at a minimum, a constitutionally protected right to petition our government for political asylum" where the statute and federal regulations governing asylum law signal "a clear intent to grant aliens the *right to submit* and the *opportunity* to substantiate their claim for asylum") (emph. added);

- *Mallette v. Arlington County Employees' Supplemental Retirement System II*, 91 F.3d 630, 635 (4th Cir. 1996) (a county retirement-benefits ordinance that narrowed the substantive range of decisionmaking to the application of certain particularized eligibility criteria with language stating "qualifying members 'shall receive' benefits" created "a legitimate claim of entitlement");

- *National Ass'n of Radiation Survivors v. Derwinsky*, 994 F.2d 583, 588 n.7 (9th Cir. 1992) (applications for service-connected death and disability compensation benefits based on exposure to nuclear radiation from atomic bomb tests, which involved a process

designed to function "with a high degree of informality and solicitude for the claimant" and that was governed by "general regulations," conferred a constitutionally-protected property interest in those benefits);

- *Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555, 1562 (11th Cir. 1989) (Congress and the executive branch granted aliens a constitutionally-protected right to apply for temporary residency under the Special Agricultural Worker program, as well as a right to substantiate their claims for eligibility, because Congress restricted decisionmakers' discretion to grant or deny benefits);

- *Ressler v. Pierce*, 692 F.2d 1212, 1215 (9th Cir. 1982) (applicants have a property interest in applications for federal rent subsidies because the controlling regulations and guidelines "closely circumscribe an owner's discretion" in the Section 8 application and selection process);

- *Holbrook v. Pitt*, 643 F.2d 1261, 1278 n.35 (7th Cir. 1981) (applicants who meet "the objective eligibility criteria of a wide variety of governmental programs have been held to be entitled to protection under the due process clause," including applicants for parole, bar admission, general assistance, federal employment, social security, chauffeur's license, Aid to Families with Dependent Children, public housing, and worker's compensation);

- *Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1132 (8th Cir. 1984) (rejecting the distinction between eligibility and termination of a benefit and instead finding "[t]he proper inquiry is whether plaintiffs have a legitimate claim of entitlement to relief assistance"; further holding that specified procedures for general relief assistance "are necessary to reduce the risk of arbitrary decisionmaking in the administration of the general relief program"); and

• *Griffeth v. Detrich*, 603 F.2d 118, 120-22 (9th Cir. 1979), *cert. denied*, 445 U.S. 970 (1980) (an authorizing statute and implementing regulations created a legitimate entitlement claim and expectancy of general relief benefits).

This Court has never squarely addressed whether an individual has a property interest in a claim to or application for benefits. *See, e.g., Gregory v. Town of Pittsfield*, 470 U.S. 1018, 1021 (1985) (mem.) (order denying certiorari) (O'Connor, J., dissenting); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985).

However, this Court did recognize more than fifty years ago (and in the immigration context) that retroactively changing the process for granting relief from deportation *from* a regime involving bridled discretion *to* a regime of predetermined results violates the Due Process Clause. *Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954).

Accardi alleged the BIA had unconstitutionally "prejudged" and denied his application for suspension of deportation. *Id.* at 262. The Attorney General had prepared a confidential list of "unsavory characters" he wished deported, and circulated the list widely to all INS and BIA employees. Accardi's name was on that list. *Id.* This Court was troubled by the fact that the BIA responded to a strong suggestion (if not a mandate) from the Attorney General, instead of exercising its own discretion as to whether Accardi should be deported. *Id.* at 267-68. *See also Lindsey v. State of Washington*, 301 U.S. 397 (1937) (retroactively applying a criminal sentencing statute to "make mandatory what was before only the maximum sentence" also violated due process).

In short, the right to a §212(c) hearing is a "matter of obvious great moment" to a LPR facing removal and separation from his family, work, and home. By eliminating

the right even to *try* to obtain relief from removal, and making removal automatic, the Fifth Circuit's immigration jurisprudence conflicts with *Accardi* and *Lindsey*.

b. Specific Eligibility Criteria Govern §212(c) Hearings

The Attorney General has discretion (which he properly delegated) to waive removal orders. 8 U.S.C. §1182(c) (1994); *I.N.S v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996). Regardless of whether Congress expressly circumscribes the Attorney General's discretion, if the BIA "announces and follows – by rule or by settled course of adjudication – a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion.'" *Yueh-Shaio Yang*, 519 U.S. at 29.

Here, policies governing the BIA's exercise of discretion do exist. Nearly thirty years ago, the BIA established criteria, comparable to common-law rules, that an IJ *must* consider when reviewing §212(c) applications. *Marin*, 16 I. & N. at 584-85. Beyond *Marin*, the BIA has further limited IJ discretion. Thus, if the LPR's crime is serious and "the negative [*Marin*] factors grow more serious," the positive factors must be stronger, usually requiring "outstanding equities." *Edwards*, 20 I. & N. Dec. at 195. If these "outstanding equities" exist, then rehabilitation becomes an important factor in the ultimate discretionary balancing the IJ undertakes. *Id.; see In re Buscemi*, 19 I. & N. Dec. 628, 633 (BIA 1988); *In re Roberts*, 20 I. & N. Dec. 294 (BIA 1991).

These factors limit BIA discretion at least as much as the statutory limits on prison officials' discretion to deprive a prisoner of "good time" credits at issue in *Wolff v. McDonnell*, 418 U.S. 539, 545-53 (1974), where this Court

found prisoners had a liberty interest in the determination of whether such credits could be taken away.

Petitioner had a legitimate expectation of obtaining relief from removal if given the opportunity to have a hearing. In the Clinic's experience, IJs, through "settled course of adjudication" [*Yueh-Shaio Yang*, 519 U.S. at 29], often grant §212(c) relief where a LPR establishes rehabilitation - one of *Marin*'s most important factors. Where no subsequent crime bars §212(c) relief, then the LPR has both qualified for discretionary relief *and* shown he has been rehabilitated and remained trouble-free. *Diaz-Resendez v. I.N.S.*, 960 F.2d 493, 497-98 (5th Cir. 1992). Most IJs with whom the Clinic has worked find rehabilitation a sufficiently strong factor as to usually grant discretionary relief. This standard applies to sex offenders too--if the crime is serious (which, admittedly, it is here) then "unusual or outstanding equities" are required. *See Edwards*, 20 I. & N. Dec. 191. But, "unusual or outstanding equities" is not hard to show. *Id.*; *Buscemi*, 19 I. & N. Dec. at 633.

It also is the Clinic's experience that §212(c) relief was particularly likely to be granted where, as here, a low-level sex offense was the crime at issue. *United States v. Copeland*, 369 F.Supp.2d 275, 289-90 (E.D.N.Y. 2005) (alien facing removal proceedings because of two or more narcotics convictions, or because of a violent crime, might be required to demonstrate "unusual or outstanding countervailing equities to obtain a waiver of deportation").

In fact, largely because of the recognition that IJs regularly granted exemption from removal in a substantial percentage of cases, some circuits recognize that a failure to inform a LPR who is subject to removal of the availability of §212(c) relief can render a removal proceeding fundamentally unfair. *E.g., United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049 (9th Cir. 2003) (underlying

removal order rendered fundamentally unfair by the IJ's failure to advise alien of his right to seek §212(c) relief; reversing the petitioner's convictions under 8 U.S.C. §1326); *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004) (failure to advise alien of right to seek §212(c) relief rendered the removal proceeding fundamentally unfair).[3]

D. The Retroactive Elimination of Some Aliens' (But Not Others') Rights To Seek §212(c) Relief Improperly Differentiates Between Similarly Situated Lawful Permanent Residents

This Court also should grant the Petition for the independently compelling reason that the disarray in the federal courts of appeals over when and whether the repeal of INA §212(c) can be applied retroactively has resulted in highly non-uniform immigration laws.

By discriminating between LPRs who pleaded guilty to a crime (who are entitled to seek §212(c) relief), and LPRs who were found guilty by a jury (who are *not* entitled to seek §212(c) relief), the Fifth Circuit makes an arbitrary and capricious distinction that bears no rational relation to the immigration laws' purpose. No reasonable basis exists upon which to believe, for example, that an alien who was found guilty of a crime after trial is more "undesirable" as a U.S. resident than an alien who pleaded guilty to the same crime. *Cf. Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976) (striking down the BIA's practice of distinguishing between aliens who had left the country and those who had never left

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[3] Again, however, the Fifth Circuit has taken a contrary view. *Lopez-Ortiz*, 313 F.3d 225 ; *Alfarache v. Cravener*, 203 F.3d 381, 383-84 (5th Cir. 2000). This view, however, wrongly equates an entitlement to receive a favorable decision in a § 212(c) hearing with the right to have such a hearing.

(2)

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ANTONIO RODRIGUEZ-ZAPATA,
Petitioner,

v.

ALBERTO R. GONZALES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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SUPREME COURT RULES

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Rule 37 1

OTHER AUTHORITIES

Black's Law Dictionary
(5th ed. 1979) 4

N. Singer, *Sutherland on Statutory Construction*
(5th rev. ed. 1993) 5

INTEREST OF *AMICUS CURIAE*[1]

The Mexican American Legal Defense and Educational Fund (MALDEF) is the leading Latino legal organization in the United States focusing on litigation, advocacy, and educational outreach. MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil rights of the 45 million Latinos living in the United States. Protecting the rights of immigrants is the focus of MALDEF's Immigrant's Rights Program. MALDEF monitors federal and state proposed legislation, submits comments on matters that affect the fair and equitable treatment of immigrants, and participates in litigation to further its mission.

SUMMARY OF ARGUMENT

As set forth in the Petition for Writ of Certiorari ("Petition"), the Courts of Appeals are fractured as to the proper role of reliance in determining whether applying a new law would result in an impermissibly retroactive effect. This Court should take this opportunity to resolve this deep division and clarify the role of reliance in retroactivity analysis.

Proof of reliance should not be required to support a determination that applying a new law would result in an impermissible retroactive effect. This Court's retroactivity jurisprudence does not require a showing of reliance as a prerequisite to a determination that applying a new law

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[1] Pursuant to Rule 37, a letter of consent from each party accompanies this filing. Pursuant to Rule 36, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

would be impermissibly retroactive. *Amicus curiae* respectfully submits that this Court should grant the Petition to make clear that reliance is not required to conclude that application of a new law is impermissibly retroactive.

ARGUMENT

This Case Presents the Court With an Opportunity To Resolve the Circuit Split Regarding Whether Reliance Is Required To Conclude That a Law Is Impermissibly Retroactive.

This Court should take this opportunity to hold plainly that neither actual nor reasonable reliance is necessary to demonstrate that a law is impermissibly retroactive. This Court's retroactivity jurisprudence does not require a showing of reliance to support a determination that applying a new law would have an impermissible retroactive effect. Instead, reliance is simply an interest furthered by the presumption against retroactive application.

The Petition in this case ably demonstrates that the Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and its progeny including *Hughes Aircraft Co. v. United States, ex rel. Schumer*, 520 U.S. 939 (1997), *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422 (2006) do not require a showing of reliance. Like the cases discussed in the Petition, the Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), provides no support for the Fifth Circuit's imposition of a reliance requirement. The Court in *Altmann* did acknowledge the reliance interest served by the traditional presumption against retroactivity: the "aim of the presumption [against retroactivity] is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in

shaping their primary conduct." *Altmann*, 541 U.S. at 696. But reliance played no part in the Court's core articulation of the test for retroactivity:

> When, however, the statute contains no such express command the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 694 (quoting *Landgraf*, 511 U.S. at 280). "While in *Altmann* the Court reaffirms that the presumption against retroactivity serves reliance *interests*, it also confirms that reliance is not a *requirement* of retroactivity." *Olatunji v. Ashcroft*, 387 F.3d 383, 393-94 (4th Cir. 2004).

So too the Court's decision in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994) provides no support for imposing a reliance requirement. The Court found the law at issue to be impermissibly retroactive because it "create[d] liabilities that had no legal existence before the Act was passed." *Id.* at 313. This was so even though there was some evidence in *Rivers* suggesting that the parties had not relied on the old law.

This Court's jurisprudence before *Landgraf* similarly does not support a reliance requirement. Indeed, the *Landgraf* Court itself set forth five different previous

articulations of the test for retroactivity. None of these tests refers to reliance, much less requires a showing of reliance:

- "A law is retrospective if it changes the legal consequences of acts completed before its effective date." *Landgraf*, 511 U.S. at 269 n.23 (quoting *Miller v. Florida*, 482 U.S. 423, 430 (1987) (internal quotation marks omitted));
- "[R]etroactive statute gives 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed.'" *Id.* (quoting *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913));
- "[A] retroactive statute is one that 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability.'" *Id.* (quoting *Sturges v. Carter*, 114 U.S. 511, 519 (1885));
- "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ." *Id.* (referring to this definition from Justice Story's decision in *Soc'y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (CCNH 1814) as quoted in *Black's Law Dictionary* 1184 (5th ed. 1979)); and
- The terms "retroactive" and "retrospective" "'describe acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act.'" *Id.*

(quoting N. Singer, *Sutherland on Statutory Construction* § 41.01 at 37 (5th rev. ed. 1993)).

Given the rampant confusion in the Courts of Appeals about the appropriate role of reliance in determining whether section 212 should be applied retroactively (*see* Petition at 10-16), this Court should grant review to provide guidance on this issue.

CONCLUSION

For these reasons, *amicus curiae* the Mexican American Legal Defense and Educational Fund respectfully requests that this Court grant the petition for writ of certiorari to make clear that reliance is not required to conclude that applying a new law would have an impermissible retroactive effect.

Respectfully submitted,

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